

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT WYLLIE DAVIS,

Plaintiff in Error,

VS.

FRED HARRISON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

Filed

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F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Supreme Court of the Territory of Hawaii.

October, 1914, Term.

(Stamped \$2.00.)

FRED HARRISON,

Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error.

Petition for a Writ of Error.

To the Honorable the Supreme Court of the Territory of Hawaii:

Your petitioner, Robert Wyllie Davis, the above-named defendant-plaintiff in error, respectfully shows and presents:

1. That in a certain action lately pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, wherein this plaintiff in error was defendant, and the above-named defendant in error was plaintiff, filed and docketed in said First Circuit Court as Law No. 7783, a decision was, on the 25th day of June, A. D. 1914, rendered and filed by the Court (jury waived) finding for the defendant in error (plaintiff in said action) and against the defendant (plaintiff in error and petitioner herein) for an undivided one-half interest in the term of years the subject of said action, and judgment thereon was by the Court on the 26th day of June, A. D. 1914, entered and filed in favor of said defendant in error, the plaintiff in said action, said

judgment being in effect that said plaintiff therein was the owner and entitled to the immediate possession of an undivided one-half for a term of years, [1*] to wit, until June 1st, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances, in said Honolulu, in Book 343, at pages 347-351, and that said plaintiff's title and ownership in said undivided one-half interest in said term of years be accordingly quieted and confirmed, and that plaintiff recover his costs taxed in the sum of \$41.75.

2. That your petitioner deems himself aggrieved by said decision and judgment.

3. That your petitioner is advised and believes that there is and manifest error was committed by said Court in said action, as is shown by the assignment of errors filed herewith.

4. That execution on said judgment has not been fully satisfied.

WHEREFORE, plaintiff in error and petitioner herein prays that a writ of error may issue from this Honorable Court to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, commanding the clerk of said court to certify up to this Honorable Supreme Court the record in said above-mentioned action, including the complaint and exhibit "A" thereto attached filed June 12, 1913, and

*Page-number appearing at top of page of original certified Record.

term summons, answer of defendant and demand for jury trial filed July 1, 1913, answer of defendant and demand for jury trial filed July 2, 1913, motion to reopen plaintiff's case for further evidence and notice of motion filed November 15, 1913, decision on motion for nonsuit filed by Honorable W. L. Whitney, December 22, 1913, plaintiff's exception to decision filed December 23, 1913, judgment [2] filed January 2, 1914, exception to judgment filed January 2, 1914, notice of decision on exception filed March 7, 1914, motion to set for further hearing and notice filed March 12, 1914, decision of W. L. Whitney, Second Judge, filed June 25, 1914, judgment filed June 26, 1914, exception to decision, exception to judgment, Plaintiff's Exhibit "A," lease and assignments John K. Sumner by trustee to A. V. Gear, recorded in liber 343, page 347, Plaintiff's Exhibit "C," assignment of leases by Addie B. Gear to Fred Harrison, dated June 6, 1913, Plaintiff's Exhibit "D," quitclaim deed by Cecil Brown to Fred Harrison, dated June 9, 1913, Plaintiff's Exhibit "E," assignment of lease by A. V. Gear to R. W. Davis, dated June 16, 1913, Defendant's Exhibit 1, assignment of leases by Fred Harrison to Addie B. Gear, dated October, 24 1910, Defendant's Exhibit 2, assignment of leases by A. V. Gear to Fred Harrison, dated November 16, 1910, all other exhibits not herein specifically mentioned, also, all the record, pleadings and exhibits in the following cases, viz.: Equity No. 1293, entitled "First Circuit Court, In the Matter of the Trust Deed of John K.

Sumner," Equity No. 1814, entitled "First Circuit Court, Fred Harrison v. A. V. Gear and Addie B. Gear, his wife," Equity No. 1828, entitled "First Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis," Law No. 7695, entitled "First Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis," and defendant's bill of exceptions on, to wit, the 6th day of November, A. D. 1914, settled and allowed by the Presiding Judge, the Honorable W. L. Whitney, together with an authenticated transcript of the evidence taken upon the trial of said cause, that the errors therein, if any, may be corrected according to law.

Dated this 11th day of November, A. D. 1914.

ROBERT W. DAVIS,

Defendant-Plaintiff in Error.

E. C. PETERS,

Attorney for Defendant-Plaintiff in Error. [3]

City and County of Honolulu,
Territory of Hawaii,—ss.

Robert Wyllie Davis, being first duly sworn, on oath deposes and says: That he is the defendant-plaintiff in error in the foregoing petition for a writ of error named; that he has read said petition for a writ of error and knows the contents thereof, and that the matters therein stated are true of his own knowledge, except those things which are therein stated and alleged upon information, advice or belief and as to those matters so alleged he believes them to be true.

ROBERT W. DAVIS.

Subscribed and sworn to before me this 11th day of November, A. D. 1914.

[Seal] HILDA SMITH,
Notary Public 1st Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Rec'd \$26.00. Filed November 11, 1914, at 2:42 P. M. J. A. Thompson, Clerk. [4]

In the Supreme Court of the Territory of Hawaii.
October, 1914, Term.

FRED HARRISON,
Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error.

Assignment of Errors.

Comes now Robert Wyllie Davis, the above-named defendant-plaintiff in error and petitioner herein, and says, that in the record, opinion and decision, judgment and proceedings had in a suit lately pending in the Circuit Court of the First Judicial Circuit, the same being an action to quiet title, wherein your petitioner was and is defendant, and Fred Harrison was and is plaintiff, there is manifest, material and prejudicial error, and petitioner herein now makes, files and presents the following assignment of errors upon which he relies as follows, to wit:

1. That the Court erred in admitting over the objection of defendant the consolidated certified copies of the lease dated June 1, 1910, from John D.

Holt, trustee, to A. V. Gear, of the land of "Mokapu" (described in the trust deed from John K. Sumner to Bruce Cartwright, trustee, dated August 16, 1892, and on August 17, 1892, recorded in the office of the Registrar of Conveyances of the Territory of Hawaii in liber 136, at pages 136-137), of the undated consent thereto by Robert Wyllie Davis, and of the mesne assignments thereof by said A. V. Gear to [5] Charles E. Peterson dated October 12, 1910, from the latter to Addie B. Gear dated October 12, 1910, and from Addie B. Gear to the plaintiff Fred Harrison dated October 21, 1910. Said lease, consent and mesne assignments were recorded in the said registry office on May 6, 1911, in liber 343, at pages 347 et seq.

The offer was objected to by defendant as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in the case, and on the further ground that said Holt named as trustee was not a trustee, but a pretended or fictitious trustee, and that he had no authority in law to give such a lease. (See page 2, bill of exceptions.)

2. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to the plaintiff while a witness on his own behalf on cross-examination, whether he (said plaintiff) were the same person named as mortgagee in a purported mortgage given by A. V. Gear to one Fred Harrison dated November 16, 1910, and upon which the proceedings in Equity Case No. 1814 were predicated.

Plaintiff's objection was that it was not proper cross-examination. (See page 3, bill of exceptions.)

3. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to plaintiff on cross-examination concerning his, said plaintiff's identity with the mortgagee named in a certain chattel mortgage from Addie B. Gear to one Fred Harrison, dated June 9, 1911, connected with the certain foreclosure proceedings brought by the said Fred Harrison against A. V. Gear and Addie B. Gear, his wife, No. 1814 Equity Division, and recorded in liber 351, at page 121, the said [6] question being as follows:

Q. I want to call your attention to another document connected with this Equity Case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison named in that particular document.

Plaintiff's objection to the question was that it was not proper cross-examination.

4. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the question propounded by defendant to plaintiff on cross-examination touching the identity of plaintiff with one Fred Harrison named as grantee in the certain deed from one Cecil Brown dated February 29, 1912, and recorded in said registrar's office in liber 366, at page 140.

Plaintiff objected to the question on the ground that it was not proper cross-examination.

5. That the court erred in permitting over the objection of defendant the question propounded to the plaintiff on redirect examination as follows:

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear?

The objection of defendant to the question was that it was not proper redirect examination.

6. That the Court erred in permitting over the objection of defendant the question propounded plaintiff on redirect examination concerning the witness's connection with the signature appended to a certain purported assignment from Addie B. Gear to the witness, dated June 6, 1913. [7]

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in the case.

7. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a certain purported agreement between Addie B. Gear and Fred Harrison dated June 6, 1913.

This instrument was admitted as Plaintiff's Exhibit "C."

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

8. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a deed from Cecil Brown, trustee, to Fred Harrison, dated June 9, 1913, the record in Equity

Case No. 1293, and the lease from John D. Holt, trustee, to A. V. Gear dated June 1, 1910, and an assignment of lease from A. V. Gear to Robert W. Davis dated June 16, 1910.

The defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

9. That the Court erred in overruling defendant's objection to and admitting in evidence upon the offer of plaintiff an assignment of A. V. Gear to Robert W. Davis, the defendant, dated June 16, 1910, of an undivided one-half interest in and to of his lease of Mokapu.

Defendant's objection to this offer was that it was incompetent, irrelevant and immaterial and did not prove or tend to prove any of the issues in the case.

The instrument was admitted as Plaintiff's Exhibit "E."

10-16. That the Court erred in overruling defendant's motion for a nonsuit, which was upon the following grounds:

(1) That the plaintiff had failed to show, nor was [8] there any evidence tending to show, that the plaintiff was entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint.

(2) That the plaintiff had failed to show and there was no evidence, either competent or otherwise, tending to show that he had any interest in the land known as Mokapu aforesaid.

(3) That the alleged and pretended appointment of one John D. Holt, or John D. Holt, Jr., by a judge of the Circuit Court of the First Circuit, was null

and void, in this, that the Circuit Court was without jurisdiction to make such appointment; and

(4) That it affirmatively appeared from the evidence that at the time of the execution of the alleged lease to the plaintiff, the defendant was possessed of a life estate in the land so referred to as "Mokapu," free and clear from any and all trusts.

11. That the Court erred in overruling defendant's objection to and admitting in evidence upon plaintiff's offer, the record and files in Case No. 1828, Equity Division of the Circuit Court of the First Circuit.

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

12. That the Court erred in overruling the objection of defendant to and permitting the following question to be propounded by plaintiff's counsel to plaintiff who had been recalled as a witness on his own behalf:

Q. I will ask you this. In this foreclosure proceeding when the time came for a sale to be made, a commissioner's [9] sale under order of the Court, who bought in whatever interests were foreclosed in this proceeding?

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

13. That the Court erred in overruling the objection of defendant to and permitting to be propounded to plaintiff by his counsel (recalled as a wit-

ness on his own behalf) the following question :

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title?

Defendant's objection was that the question was immaterial.

14. That the Court erred in overruling the objection of defendant on the ground of immateriality and admitting in evidence upon the offer of plaintiff, the record and files of Law No. 7695 of the Circuit Court of the First Judicial Circuit.

15. That the Court erred in overruling the objection of defendant on the ground of immateriality and permitting plaintiff's counsel to propound to the plaintiff who was recalled for further examination, the following question :

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When the nonsuit was granted, what, if anything, further did you do?

17. That the Court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner of an undivided one-half interest in the land known as "Mokapu," [10] dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

Plaintiff's objection was that it was incompetent,

irrelevant and immaterial and defendant was estopped from introducing any such deed in evidence.

18. That the Court erred in sustaining the objection of plaintiff to and rejecting the offer of defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the registrar of conveyances of the Territory of Hawaii, in liber 303, at page 91, whereby the said Robert W. Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence.

19. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the following question propounded by defendant to the defendant Robert Wyllie Davis, while a witness on his own behalf in defense:

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d day of January, 1906, recorded in liber 303, at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage?

Plaintiff's objection was that the question was incompetent, irrelevant and immaterial, and the defendant was estopped from introducing any such papers in evidence.

20. That the Court erred in overruling the objec-

tion of defendant to and permitting the following question propounded [11] by plaintiff to A. V. Gear, called as a witness by plaintiff in rebuttal:

Q. Were you still working under the agreement with Wylie Davis at the time you took this 25-year leasehold? (Tr. II, p. 27.)

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

21. That the Court erred in denying defendant's motion to strike out the answer of the witness A. V. Gear given on direct examination on rebuttal, as follows:

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

The ground of defendant's motion was that it appeared that the witness was testifying in respect to two agreements, the contents of which were unknown.

22. That the Court erred in overruling the objection of defendant to the question propounded by plaintiff to the witness A. V. Gear on direct examination in rebuttal, as follows:

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gear, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his in-

terest to Sumner was discussed? (Tr. II, p. 27.)

Defendant's objection was on the ground that there were not any agreements in evidence and the time laid was indefinite.

23. That the Court erred in overruling the defendant's [12] objection to the following question propounded to the witness A. V. Gear on direct examination:

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

Defendant's objection to this question was that it was irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues of the case and calling for a conclusion of the witness.

24. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound the following question on direct examination of the witness A. V. Gear who had been called on rebuttal:

Q. Just answer "Yes" or "No" to this question. Did you ever know from Wallie Davis' own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and indefinite.

25. That the Court erred in overruling the ob-

jection of defendant to and permitting plaintiff to propound the following question to the witness Gear on direct examination while called in rebuttal:

Q. Will you state what that statement was?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

26. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound to the witness Gear on cross-examination when called in rebuttal, the [13] following question:

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he spoke of giving Mokapu as security, did he mention anything about the amount of the advances which he had secured?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial.

27. That the Court erred in overruling the objection of defendant to and permitting the plaintiff to propound to the witness Gear on direct examination on rebuttal, the following question:

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and

Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910?

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

28. That the Court erred in granting over the objection of defendant plaintiff's motion to amend the prayer of his complaint to read as follows:

"Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of [14] said term of years may be quieted and that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

Defendant's objection was that the motion was made too late.

29. That the Court erred in finding for the plaintiff for an undivided half of the term of years set out in the complaint, said finding being against the law and the evidence and the weight of the evidence.

30. That the Court erred in not finding and deciding that the plaintiff was not entitled to any interest whatsoever in the land known as Mokapu.

31. That the Court erred in entering its judgment herein adjudging that the plaintiff was the owner and

entitled to the immediate possession of an undivided one-half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances in said Honolulu, in liber 343, at pages 347-351, upon the ground that said judgment is contrary to the law and the evidence and the weight of the evidence.

32. That the Court erred in adjudging that the plaintiff was entitled to any interest in the land known as Mokapu.

33. That the Court erred in not entering its judgment herein that plaintiff take nothing by his said action.

Dated this 11th day of November, A. D. 1914.

ROBERT W. DAVIS,
Defendant-Plaintiff in Error.

E. C. PETERS,
Attorney for Plaintiff in Error.

[Endorsed]: Filed November 11, 1914, at 2:42
P. M. J. A. Thompson, Clerk. [15]

In the Supreme Court of the Territory of Hawaii.
October, 1914, Term.

FRED HARRISON,
Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error.

**Notice [of Issuance of Writ of Error Returnable in
Supreme Court, Territory of Hawaii].**

To the Above-named Plaintiff-Defendant in Error,
and Messrs. Thompson, Wilder, Watson &
Lymer, His Attorneys:

You and each of you will please take notice that a
Writ of Error has issued from the Supreme Court
of the Territory of Hawaii to the Circuit Court of
the First Judicial Circuit of said Territory, in the
action lately pending therein, in which you, the said
Fred Harrison, were plaintiff, and the undersigned
Robert Wyllie Davis, was defendant, numbered and
docketed in said court as Law No. 7783.

Dated this 11th day of November, A. D. 1914.

ROBERT W. DAVIS,
Defendant-Plaintiff in Error.

E. C. PETERS,
Attorney for Plaintiff in Error.

[Endorsed]: Filed November 11, 1914, at 2:42
P. M. J. A. Thompson, Clerk. [16]

In the Supreme Court of the Territory of Hawaii.
(Stamped \$2.00.)

FRED HARRISON,
Plaintiff-Defendant in Error,

v.

ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error.

Summons [on Return to Writ of Error in Supreme Court, Territory of Hawaii].

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy:

You are commanded to summon Fred Harrison, plaintiff-defendant in error, above named, to appear before the Supreme Court of the Territory of Hawaii within twenty (20) days after service hereof, to answer the annexed petition for a writ of error, etc., of Robert Wyllie Davis, defendant-plaintiff in error above-named.

And have you *then there* this writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, city and county of Honolulu, this 11th day of November, A. D. 1914.

[Seal]

J. A. THOMPSON,

Clerk. [17]

Served the within Summons on Fred Harrison, therein named as plaintiff-defendant in error, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 12th day of November, A. D. 1914, by delivering to him a certified copy hereof and of the Petition for a Writ of Error, Assignment of Errors, and Notice annexed hereto and at the same time showing him the original Petition for a Writ of Error, Assignment of Errors, Notice and Summons.

Dated Honolulu, city and county of Honolulu, Territory of Hawaii, this 12th day of November, A. D. 1914.

W. P. JARRETT,
High Sheriff, Territory of Hawaii.

[Endorsed]: No. 814. Supreme Court, Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in error, v. Robert W. Davis, Defendant-Plaintiff in Error. Summons. Issued at 2:45 o'clock, P. M. November 11, 1914. J. A. Thompson, Clerk. Returned at 1:40 o'clock P. M. November 12, 1914. J. A. Thompson, Clerk.

Received at 3:56 P. M. Nov. 11, A. D. 1914.

P. GLEASON,
Deputy High Sheriff.

In the Supreme Court of the Territory of Hawaii.

October, 1914, Term.

(\$1 Stamp.)

FRED HARRISON,
Plaintiff-Defendant in Error,
vs.

ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error.

Bond [on Writ of Error Returnable in Supreme Court, Territory of Hawaii].

KNOW ALL MEN BY THESE PRESENTS:
That we, Robert Wyllie Davis, of Honolulu, city and county of Honolulu, Territory of Hawaii, as principal, and Hilda Smith of the same place, as surety,

are held and firmly bound unto Fred Harrison, his heirs, executors, administrators and assigns, in the penal sum of \$100, the payment of which well and truly to be made unto the said Fred Harrison, his heirs, executors, administrators or assigns, we do hereby bind ourselves, our and each of our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, THAT:

WHEREAS, upon the date hereof, the above-named plaintiff in error filed his petition for a writ of error in the Supreme Court of the Territory of Hawaii, directed to the clerk of the Circuit Court of the First Judicial Circuit of said Territory, commanding him to forthwith send up to said Supreme Court the record, including all pleadings, motions, exhibits, bills of exceptions filed in, and a certified transcript of the evidence taken and other proceedings had upon the trial of the certain [18] action in said court lately pending, wherein the above-named defendant in error was plaintiff, and the above-named plaintiff in error was defendant, filed and docketed in said First Circuit Court as Law No. 7783.

NOW, THEREFORE, shall the above-named plaintiff in error fail to sustain his Writ of Error and shall pay, in case thereof, the judgment in said original cause, then this obligation is to be null and void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said above-

bounden principal and surety have hereunto set their hands and seals, this 11th day of November, A. D. 1914.

ROBERT W. DAVIS, (Seal)
Principal.

HILDA SMITH, (Seal)
Surety.

APPROVED as to amount and sufficiency of surety, this 11th day of November, A. D. 1914.

WM. L. WHITNEY,
Judge Presiding 1st Circuit Court.

[Endorsed]: No. 814. Supreme Court, Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in Error, vs. Robert W. Davis, Defendant-Plaintiff in Error. Bond. Filed November 11, 1914, at 2:42 P. M. J. A. Thompson, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Plff. in Error. [19]

In the Supreme Court of the Territory of Hawaii.

October Term, 1914.

(Stamped \$2.00.)

FRED HARRISON,
Plaintiff-Defendant in Error,
vs.

ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error.

**Writ of Error [Returnable in Supreme Court,
Territory of Hawaii].**

The Territory of Hawaii: To John Marcallino, Esquire, Clerk Circuit Court, First Circuit.

WHEREAS, in an action lately pending before the Circuit Court of the First Circuit, in which the said Fred Harrison was plaintiff, and the said Robert Wyllie Davis was defendant, error is alleged to have occurred as appears by the assignment of errors on file in this court, you are commanded forthwith to send up to this court the record and the exhibits filed in said proceedings, including the complaint and exhibit "A" thereto attached filed June 12, 1913, and term summons, answer of defendant and demand for jury trial filed July 1, 1913, answer of defendant and demand for jury trial filed July 2, 1913, motion to reopen plaintiff's case for further evidence and notice of motion filed November 15, 1913, decision on motion for nonsuit filed by Honorable W. L. Whitney December 22, 1913, plaintiff's exception to decision filed December 23, 1913, judgment filed January 2, 1914, exception to judgment filed January 2, 1914, notice of decision on exceptions filed March 7, 1914, motion to set for [20] further hearing and notice filed March 12, 1914, decision of W. L. Whitney, Second Judge, filed June 25, 1914, judgment filed June 26, 1914, exception to decision, exception to judgment, Plaintiff's Exhibit "A," lease and assignments John K. Sumner by Trustee to A. V. Gear, recorded in liber 343, page 347, Plaintiff's Exhibit "C," assignment of leases by Addie B. Gear

to Fred Harrison, dated June 6, 1913, Plaintiff's Exhibit "D," quitclaim deed by Cecil Brown to Fred Harrison, dated June 9, 1913, Plaintiff's Exhibit "E," assignment of lease by A. V. Gear to R. W. Davis, dated June 16, 1913, Defendant's Exhibit 1, assignment of leases by Fred Harrison to Addie B. Gear, dated October 24, 1910, Defendant's Exhibit 2, assignment of leases by A. V. Gear to Fred Harrison, dated November 16, 1910, all other exhibits not herein specifically mentioned, also, all the record, pleadings and exhibits in the following cases, viz: Equity No. 1293, entitled "First Circuit Court In the Matter of the Trust Deed of John K. Sumner," Equity No. 1814, entitled "First Circuit Court, Fred Harrison v. A. V. Gear and Addie B. Gear, his wife," Equity No. 1828, entitled "First Circuit Court," Cecil Brown, Trustee, v. Robert Wyllie Davis," Law No. 7695, entitled "First Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis," and defendant's bill of exceptions on to wit, the 6th day of November, A. D. 1914, settled and allowed by the Presiding Judge, the Honorable W. L. Whitney, together with an authenticated transcript of the evidence taken upon the trial of said cause.

WITNESS, the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court, at Honolulu, Territory of Hawaii, [21] this 11th day of November, A. D. 1914.

By the COURT.

[Seal]

J. A. THOMPSON,
Clerk Supreme Court.

Received the foregoing Writ of Error on this 11th day of November, 1914, at 3 o'clock P. M.

JOHN MARCALLINO,
Clerk Circuit Court 1st Circuit.

In obedience to the within writ to me directed I herewith send up the record and all the exhibits filed in said above mentioned cause.

JOHN MARCALLINO,
Clerk Circuit Court First Circuit.

Dated this 28th day of November, A. D. 1914.

[Endorsed]: No. 814. Supreme Court Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in Error, vs. Robert W. Davis, Defendant-Plaintiff in Error. Writ of Error. Filed and Issued November 11, 1914, at 2:45 P. M. J. A. Thompson, Clerk. Returned November 28, 1914, at 9:45 A. M. J. A. Thompson, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Plff. in Error. [22]

In the Supreme Court of the Territory of Hawaii.
October, 1914, Term.

WRIT OF ERROR.

FRED HARRISON,
Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error.

**Appearance of Counsel for Defendant in Error [in
Supreme Court, Territory of Hawaii].**

The clerk of the above-entitled court will enter

the appearance of the undersigned as counsel for plaintiff-defendant in error in the above-entitled cause.

THOMPSON, WILDER, MILVERTON &
LYMER,

W. B. L.,

Attorneys for Plaintiff-Defendant in Error.

Dated at Honolulu, this 13th day of November,
A. D. 1914.

[Endorsed]: No. 814. Supreme Court of the Territory of Hawaii. Fred Harrison vs. Robert Wyllie Davis. Appearance. Filed November 13, 1914, at 4:00 P. M. Robert Parker, Jr., Assistant Clerk. Thompson, Wilder, Milverton & Lymer, 2-11 Campbell Block, Honolulu, Attorneys for Plaintiff-Defendant in Error. [23]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

\$2.00 Stamps.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Complaint.

To the Honorable Presiding Judge of the Circuit
Court of the First Circuit:

The undersigned, Fred Harrison, of the city and

county of Honolulu, Territory of Hawaii, plaintiff herein, complains of Robert Wyllie Davis, of said city and county of Honolulu, defendant herein, and for cause of action alleges:

1. That the plaintiff is entitled to one undivided half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu aforesaid, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances in said Honolulu in book 343, pages 347-251, a copy of which lease is hereto attached and made a part hereof marked exhibit "A."

2. That defendant claims said undivided one-half of said land adversely to plaintiff, and plaintiff is desirous of having the title thereto adjudicated and quieted. [24]

3. That defendant is a necessary party to the complete determination and settlement of the question of title involved herein.

WHEREFORE, the plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term hereof, unless sooner disposed of by judicial authority; that defendant may be required to set up any adverse claim which he may have in and to said undivided half of said land; and for costs.

Dated Honolulu, June 12, 1913.

(Signed) FRED HARRISON,
Plaintiff.

THOMPSON WILDER, WATSON & LYMER,
(Signed) W. B. L.,
Attorneys for Plaintiff.

Territory of Hawaii,

City and County of Honolulu,—ss.

Fred Harrison, being duly sworn, deposes and says that he is the plaintiff above named; that he has read the foregoing complaint and that the same is true.

(Signed) FRED HARRISON.

Subscribed and sworn to before me this 12th day of June, A. D. 1913.

[Seal] (Signed) J. R. KINNY,
Notary Public, First Judicial Circuit, Territory of Hawaii. [25]

Exhibit "A" [to Complaint].

THIS INDENTURE of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee.

WHEREAS, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313, 314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in

trust, nevertheless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust.

AND WHEREAS, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii, Now this Indenture witnesseth:

That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313, 314.

TO HAVE AND TO HOLD the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said lessee, his executors, administrators and assigns for and during the term of twenty-five years from the first day of June, A. D. 1910.

Yielding and paying therefor rent as follows:
[26]

For the first year the rental shall be free:

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenants with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

IN WITNESS WHEREOF, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

(S) JNO. D. HOLT,
Trustee.

(S) A. V. GEAR.

KNOW ALL MEN BY THESE PRESENTS: That I, Robert Wyllie Davis of Mokapu, Koolau-poko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust.

(S) ROBERT WYLLIE DAVIS. [27]

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me personally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] (S) WILLIAM SAVIDGE,
Notary Public First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal] (S) WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed Jun. 12, 1913, at 9:10 o'clock
A. M. (Signed) J. A. Dominis, Clerk. [28]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

Holding Terms in the City and County of Honolulu.

\$2.00 Stamps.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Term Summons.

The Territory of Hawaii, to the High Sheriff of the
Territory of Hawaii, or his Deputy; the Sheriff
of the City and County of Honolulu or his
Deputy:

You are commanded to summons ROBERT
WYLLIE DAVIS, defendant, in case he shall file
written answer within twenty days after service
hereof, to be and appear before the said Circuit
Court at the term thereof pending immediately after
the expiration of twenty days after service hereof;
provided, however, if no term be pending at such
time, then to be and appear before the said Circuit
Court at the next succeeding term thereof, to wit,
the 1914 term thereof, to be holden at the city and
county of Honolulu, on Monday, the 12th day of
January next, at 10 o'clock A. M. to show cause why
the claim of Fred Harrison, plaintiff, should not be
awarded to him pursuant to the tenor of his annexed
Complaint.

And have you then and there this Writ with full

return of your [29] proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit, at Honolulu aforesaid, this 12th day of June, 1913.

[Seal] (Signed) J. A. DOMINIS,
Clerk.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Term Summons. Issued at 9:10 o'clock A. M. June 12th, 1913. (Signed) J. A. Dominis, Clerk. Returned at 1:35 o'clock P. M. June 18th, 1913. (Signed) J. A. Dominis, Clerk. Service at \$1.00 each.....Cop..... at \$1.50 each..... Expense Total \$..... Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii, do hereby certify and make return that I have served the within Summons, Complaint and exhibit "A" as follows:

On Robert Wyllie Davis, therein named as defendant, at Kaneohe, District of Koolaupoko, city and county of Honolulu, Territory of Hawaii, this 16th day of June, A. D. 1913, by delivering to him a certified copy hereof and of the complaint and exhibit "A" annexed hereto and at the same time showing him the original as herein directed. Dated Kaneohe, District of Koolaupoko, city and county

of Honolulu, Territory of Hawaii, this 16th day of June, A. D. 1913.

(Signed) WM. HENRY,
High Sheriff, Territory of Hawaii. [30]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Answer.

Comes now the defendant above named and by way of answer to the Complaint of plaintiff herein denies each and every, all and singular, the allegation in the Complaint herein contained.

Dated.

(Signed) E. C. PETERS,
Attorney for Defendant. [31]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Demand for Jury Trial.

Comes now the defendant above named and prays
a trial by jury in the above-entitled cause.

Dated.

(Signed) E. C. PETERS,

——— Defendant.

[Endorsed]: L. 7783. Reg. 4 Pg. 249. No. —
Circuit Court, First Circuit, Territory of Hawaii.
Fred Harrison, Plaintiff, vs. Robert Wyllie Davis,
Defendant. Answer and Demand for Jury Trial.
Filed Jul. 1, 1913, 1:35 o'clock P. M. (Signed) J. A.
Dominis, Clerk. [32]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Answer.

Comes now the defendant above named and by way of answer to the Complaint of plaintiff herein denies each and every, all and singular, the allegations in the Complaint herein contained.

Dated.

(Signed) E. C. PETERS,
Attorney for Defendant. [33]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Demand for Jury Trial.

Comes now the defendant above named and prays
a trial by jury in the above-entitled cause.

Dated.

(Signed) E. C. PETERS,
——— Defendant.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. No. —
Circuit Court, First Circuit, Territory of Hawaii.
Fred Harrison, Plaintiff, vs. Robert Wyllie Davis,
Defendant. Answer and Demand for Jury Trial.
Filed 6:15 P. M. July 2, 1913. Henry, Smith
Clerk. E. C. Peters, 210-211 McCandless Building,
Honolulu, T. H., Attorney for Defendant. [34]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Statement of Facts.

John K. Sumner in 1892 conveyed the land of
“Mokapu” to Bruce Cartwright in trust, “In the
first place, to pay the rents, issues and profits arising
therefrom or thereout so long as the lease now in

existence is in force, to me, the said party of the first part, and upon the expiration of the present lease or other sooner determination, to pay the rents, issues and profits arising from or out of said land, to my nephew Robert Wyllie Davis during the term of his natural life or in the discretion of said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes. And in the second place, from and after the death of the said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten, and failing such heirs of his body, then to the wife if living of the said Robert W. Davis, and failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis, [35] share and share alike" (1).

Subsequently, Cartwright resigned and one J. D. Holt, Jr., was appointed substitute trustee (2).

In 1910 Holt as trustee with the written consent of Davis leased "Mokapu" to A. V. Gear (3), who assigned one undivided half interest in the lease (fully paid up) to Davis (4); and the other (by mesne assignments) to his wife, Addie Gear (5).

The plaintiff Harrison is the assignee in interest of Addie Gear (6).

Plaintiff in his complaint prayed that his undivided half interest in the lease be quieted in him and alleged that Davis owned the other undivided half of the same lease.

In support of his complaint plaintiff offered evidence of paper title beginning with the Sumner trust

deed and *ending himself* as the last taker; and the assignment by Gear to Davis.

QUERIES ON MOTION FOR NONSUIT:

1. Was it necessary for plaintiff to show affirmatively that the lease referred to in the trust deed had terminated prior to the Gear lease?

2. Was it necessary for plaintiff to show complete paper title from L. C. A. down to himself, or was this unnecessary upon the theory;

1. J. K. Sumner to Bruce Cartwright. Dated Aug. 16, 1892. Rec. L. 136, p. 313.
2. In re Petition John D. Holt, Jr., First Circuit Court, Eq. #1293.
3. John D. Holt, Tr., to A. V. Gear. Dated June 1, 1910. Rec. L. 343, p. 347.
4. A. V. Gear to R. W. Davis. Dated June 16, 1910.
5. A. V. Gear to C. A. Peterson. Dated Oct. 12, 1910 Rec. L. 343 p. 349. C. A. Peterson to Addie B. Gear. Dated Oct. 12, 1910. Rec. L. 343 p. 350.
6. Record foreclosure; Harrison v. Gear et ux. First Circuit Court, Eq. #1814 Assignment Cecil Brown Tr., to Fred Harrison, June, 1913. Assignment Addie B. Gear to Fred Harrison, June, 1913. [36]

(a) That plaintiff and defendant claimed from a common source of title; or

(b) Defendant took title from plaintiff's mesne assignor and was therefor estopped to deny.

(3) Presuming that the lease referred to in the

Sumner trust deed had terminated, was Holt's lease void upon the theory;

(a) Davis' discretionary power of occupancy for purposes of agriculture, etc., prevented the trustee from making a lease to a third party; and

(b) The statute of uses executed the trust and vested the legal estate in the cestui Davis.

(4) Was the Holt lease good upon the theory:

(a) That Davis consented to and ratified the Gear lease;

(b) That Davis by his consent to the Gear lease elected to take the "rents," etc., under the Sumner trust deed instead of occupying the premises for purposes of "agriculture" etc.,

(5) What interest did Davis have in the land prior to the Gear lease, presuming the lease referred to in the Sumner trust deed to have terminated?

We shall discuss the queries *seriatim*.

1. The trust deed discloses the existence of a lease covering the whole or a part of the premises granted. Plaintiff claims a lease of the premises as a whole. The powers, if any, of the trustee, could not become operative until the termination of the existing lease. Rents [37] accruing under it were payable by the trustee to Sumner. The trust deed was expressly made subject to this lease. Upon the record the lease to Gear, though silent as to the existing lease, was subject to it. The record makes the subjection as strong as though it were incorporated by reference or exception in the lease. It is impossible to say that the term demised was in *praesenti* or *futuro*.

The burden of proof is upon the plaintiff (1).

The obligation rests upon him to show that he is the owner of a valid subsisting lease; a lease existing at the time of the institution of the action. No presumption of title can be invoked. And no presumption of fiduciary integrity can supply a failure of proof and shift the burden upon the defendant. Where an exception to a lease or grant appears, the burden is upon the plaintiff to show that the land, subject to the action, is not within or subject to the exception (2).

2. We deem it unnecessary to enter into any discussion as to the derivation or source of title to land in this country. Ordinarily, it was incumbent upon the plaintiff claiming under a paper title to begin in the order of proof at the initial sovereign grant and follow his title down to himself or his ancestor as the last taker.

(3) And in the absence of any qualification of this rule, this should have been done in this case.

1. *Lunalilo Trustee v. Waihee Sugar Co.*, 7 Haw. 282.
2. *Rensens v. Lawson*, 91 Va. 226; 21 S. E. 347;
Maxwell Land Grant Co. v. Dawson, 151 U. S. 586;
Harman v. Straus, 27 S. E. 69;
Hall v. Martin, 89 Ky. 9; 11 S. E. 953;
Mills v. Edzell, 71 S. E. 574;
Fuller v. Keese, 104 S. W. 700.
Kahele v. Anima, 13 Haw. 512. [38]

(a) But plaintiff maintains that the parties claim under a common source of title and, hence, the neces-

sity of showing anterior mesne conveyances to Sumner was obviated. Hawaiian authority recognizes the rule (1). But this is not a case in which the rule can be invoked. Plaintiff assumes that the defendant's interest in the term of years is an undivided one-half under the alleged or pretended assignment to him by Gear; and predicates this assumption upon the evidence adduced by him in the case in chief. But, as herein subsequently argued by us under subdivision 3 (a), (b), the use as to the life estate in Davis was executed and a legal and equitable interest therein merged in him. Hence Holt had no title under which he could give any lease. And Davis took no greater title than his assignor in interest. The only theory upon which the plaintiff in this case could assume that Davis claimed an undivided one-half interest in the term of years which is the subject of this suit, would be upon the theory of estoppel by deed, that is to say, that Davis is estopped to question Harrison's title by reason of the fact that he accepted an undivided one-half interest in the same lease from Gear.

(b) But while ordinarily a tenant is estopped from denying the title of his landlord, the alleged leasehold interest of Davis comes from Gear

1. *McCandless v. Hon. P. Co.*, 20 Haw. 239 [39] and not from Harrison. Moreover, in an action at law to quiet title, Harrison is in no position to invoke the rule. Were the law otherwise, the action would be farcical. It might be said that the hailing of the tenant into court to test a cotenant's title constitutes a

waiver of any claim of estoppel. Moreover, this is not a case in which the use or possession of the land is involved. This is an action to try title alone. And under such circumstances, the rule is not applicable (1).

3. (a) The trust "to pay the rents," etc., might be considered as creating an active trust. But the further use "or in the discretion of said Robert Wyllie Davis to permit him to reside upon said premises" etc., does violence to any such theory. The trust as to the life estate to Robert Wyllie Davis is a mere passive one and the use must be considered as executed. So that an absolute life estate vested in Robert Wyllie Davis (2).

Hence, the lease to Gear was a nullity. The legal and equitable estate was merged in Davis. Holt had no title, and could give no title.

(b) It was Davis' discretionary right of occupancy that executed the use. The trustee could not make a lease in the face of that power conferred upon Davis by the trust deed.

1. McKie v. Anderson, 78 Tex. 207; 14 S. W. 796. 24 Cyc. 942.
2. Haw. T. & I. Co. v. Barton, 16 Haw. 301.
Estate of Boardman, 5 Haw. 146.
Kidwell v. Godfrey, 14 Haw. 138.
Kane et al. v. Perry, 3 Haw. 663-4.
Kalaeokekai v. Kahele, 7 Haw. 147-148.
Dreier v. Holt, 18 Haw. 183.
Johnson v. Blake, 32 S. E. 397.
Semis v. Howe, 72 N. Y. St. 851; affirmed
66 N. E. 975.

Wainwright v. Law, 132 N. Y. 313; affirmed
30 N. E. 747.

Ramsay v. Marsh, 2 McCord (N. C.) 252; 13
Am. Dec. 717.

Commended in Henderson et ux. v. Griffin,
5 Pet. (U. S.) 151. [40]

4. (a) Davis had no right of "election." The terms of the trust deed *per se* executed the use. Nor does Davis' so-called ratification and consent to the Gear lease create a valid lease. There was no consideration for this consent or ratification either "good" or "valuable." The consent is silent as to any consideration. And the assignment to him of an undivided one-half interest occurred sixteen days later, one dollar being stated to be the consideration therefor.

Nor is Davis estopped to deny his consent. Holt was not Davis' agent either expressed or implied. He was a mere volunteer. The law of ratification in principal and agent has no application. The lease and consent are to be taken as having been executed in their logical order (1). Hence, the lease was executed before the consent. Gear dealt with Holt. After his negotiations with Holt he dealt with Davis. The trust deed was of record and was also referred to in the lease. No representation either actively or passively was made by Davis. Gear's status was not changed by any act of Davis. And there was no obligation on the part of Holt to pay Davis the rent reserved in the lease. Estoppel under these circumstances does not appear (1).

1. Walker v. Peterson, 9 Haw. 93. [41]

5. The use was executed. Davis could mortgage, sell or otherwise dispose of his life estate unhampered by the terms of the trust.

We respectfully submit that the motion for a non-suit herein is well taken.

Respectfully submitted,
(Signed) E. C. PETERS,
Attorney for Defendant.

Honolulu, Oct. 21, 1913.

1. Richards v. On Tai, 19 Haw. 451.

Carty v. Jarrett, 21 Haw. 274.

[Endorsed]: No. — Circuit Court, First Circuit. Territory of Hawaii. Fred Harrison, v. R. W. Davis. Statement of Facts Filed Oct. 22d, 1913, at 9: 12 A. M. (Signed.) J. Marcallino, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [42]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

Law No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Motion to Reopen Plaintiff's Case for Further Evidence.

To the Honorable WM. L. WHITNEY, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Now comes Fred Harrison, plaintiff in the above-entitled cause, and moves that the hearing of the evidence on behalf of plaintiff, heretofore closed on October —, 1913, and now pending on defendant's motion for nonsuit, be reopened to permit said plaintiff to produce certain additional evidence tending to show and showing that defendant herein claims, adversely to said plaintiff, the undivided one-half interest in and to that certain lease hold, title to which plaintiff seeks to quiet by this present suit, which said adverse claim of said defendant is based upon a source of title common to both plaintiff and defendant herein, to wit, that certain trust deed from John K. Sumner to Bruce Cartwright, Trustee, dated August 16, 1892, and recorded in Liber 136, page 313 of the Hawaiian Registry of Conveyances; said further evidence consisting more particularly in the record of that certain proceeding in the above-entitled court, being Equity No. 1828 of the files of said court, and [43] denominated "Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant," and more particularly the "Answer of Robert Wyllie Davis" on file as a part of said record proceeding.

This motion is *bsed* upon all the record herein, in-

cluding all the evidence heretofore taken and upon the entire files and pleadings in said cause.

Dated Honolulu, T. H., November 15, 1913.

FRED HARRISON,
Plaintiff,

By THOMPSON, WILDER, WATSON & LY-
MER,

(Signed) W. B. L.,
His Attorneys.

Notice [of Motion for Further Evidence].

To Robert Wyllie Davis, Defendant, and E. C. Peters,
Esquire, His Attorney:

Please take notice that the foregoing Motion will be presented before the Honorable Wm. L. Whitney, Second Judge of the Circuit Court of the First Judicial Circuit, in his courtroom in the Judiciary Building, Honolulu, on Monday, November 17, 1913, at 1:30 o'clock P. M., or as soon thereafter as counsel may be heard.

THOMPSON, WILDER, WATSON & LY-
MER,

(Signed) W. B. L.,
Attorneys for Plaintiff.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit. Territory of Hawaii. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Motion to Reopen Plaintiff's Case for Further Evidence and Notice. Filed Nov. 15, 1913, at 11:40 o'clock A. M. (Signed) J. A. Dominis, Clerk. [44]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

Law No. 7783.

FREDERICK HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Decision on Motion for Nonsuit.

This is a statutory action to quiet title brought by the plaintiff claiming an undivided one-half in a term of years in certain lands known as the lands of Mokapu, situated on the Koolau side of the Island of Oahu. The plaintiff claims through a certain lease of the lands in question made June 1, 1910, by John D. Holt, Jr. (as substituted trustee under a deed of trust from John K. Sumner to Bruce Cartwright, dated August 16, 1892), to A. V. Gear, for the term of twenty-five years from said first day of June, 1910. Said Gear on June 16, 1910, assigned one-half of his term of years to Robert Wyllie Davis, the defendant herein, and on October 12, 1910, executed an assignment of the remainder of his term of years to one C. F. Peterson, who, in turn, assigned the same to Addie B. Gear, the wife of A. V. Gear. She, on October 21, 1910, made an assignment of the same to the plaintiff herein.

At the trial of the case plaintiff put in evidence

his paper title showing: (1) A trust deed from John K. Sumner to Bruce Cartwright of the land in question, under certain trusts, "In the first place, to pay the rents, issues, [45] and profits arising therefrom or thereout, so long as the lease now in existence is in force, to me, the said" John K. Sumner, "and upon the expiration of the present lease, or sooner determination thereof, to pay the rents, issues, and profits arising from and out of said land to my nephew, Robert Wyllie Davis, during the term of his natural life, or, in the discretion of said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes; and, in the second place, from and after the death of said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten; and, failing such heirs of his body, then to the wife, if living, of said Robert W. Davis; and, failing such wife, then to convey the said premises to the heirs at law of the said Robert W. Davis, share and share alike."

(2) The resignation of Bruce Cartwright as such Trustee and the appointment in his place of John D. Holt, Jr.

(3) A lease from Holt, Trustee, to A. V. Gear of all the land of Mokapu for the term of twenty-five years, in which lease the defendant joined by way of consent.

(4) Assignment of one-half this term of years to the defendant herein.

(5) Assignment and mesne assignments bring-

ing the remaining half to the plaintiff.

Plaintiff having thereupon rested, the defendant moved for a nonsuit, claiming, first, that the evidence of the plaintiff showed affirmatively that there was a lease outstanding when the lease to Gear, under which plaintiff claims, was made by Holt, Trustee; second, that plaintiff had failed to deraign his title from the government; third, that [46] the Statute of Uses had executed the trust, and that the defendant was the owner of a life interest in the property, and that, therefore, the lease of Holt, Trustee, was invalid.

We will discuss the points in the reverse order in which they were raised;

First, has the Statute of Uses executed the trust? That the Statute of Uses is enforced in this jurisdiction is now certain (*Hawn. Trust & Investment Co. v. Barton*, 16 *Hawn.*, 301), but even in that case a bequest of a trustee "and his successors in trust for the use and benefit of the legatees" where the will further provides that "the income of the same to be paid to him" (that is to the *cestui*) "by my executor hereinafter named, for his use and support for the term of his natural life" created an active trust, and the Statute would not execute the same.

It likewise seems to me that the further provision of the deed in question, namely, "or in the discretion of the said Robert W. Davis to permit him to reside upon said premises, and, while so residing, to use the same for grazing and agricultural purposes" creates an active duty on the part of the trustee.

It will be seen that the trustee is to "permit" him to hold the land in lieu of the rents and issues thereof only so long as he actually resides thereon and only so long as he uses the land for "grazing and agricultural purposes." The right which the defendant had in the land is less in numerous particulars than a life estate would have been. There was no absolute right or estate in the defendant at any time. There was no right to convey or assign this interest in the land during the term of Davis' natural life. All the trust deed gave to Davis was an option either to take the rents, issues, and profits, or, in lieu thereof, to reside upon the land. [47] Immediately upon his leaving the land it would again be the duty of the trustee to collect the rents, issues, and profits and pay them over to the defendant. This, in my opinion, is not a naked trust.

I am, therefore, of the opinion that the defendant did not own a life estate in the land in question and had no rights except those above indicated, namely: to receive the rents, issues, and profits or reside on the land and use the same in the manner indicated.

Second, was it necessary for plaintiff to deraign his title from the Government? It is now settled in this jurisdiction that where both parties claim from a common source of title, the plaintiff need show title only so far as the common *course* (*McCandless v. Hon. Pl. Co.*, 19 *Hawn.*, 239). The complaint herein alleges that the plaintiff is entitled to a one-half interest in a certain term of years and that the defendant claims said one-half interest also claimed

by the defendant. The plaintiff admits that the defendant is entitled to one-half of the term of years created by the lease of Holt, trustee, above referred to, but plaintiff further says that the defendant is likewise claiming the remaining one-half. Under what chain of title defendant claims to be entitled to the estate in question we are as yet unaware, for defendant's answer does not set up his title or claim, and we have not as yet reached his case. Can it, therefore, be said that either the lease from Holt to Gear or the trust deed from Sumner to Cartwright is the common source of title? Does it anywhere in the case as thus far presented "affirmatively appear that plaintiff and defendant both claim title from the same source"? All that does appear is that under a certain instrument plaintiff claims a one-half interest in the estate, and that under another instrument defendant is entitled to a like half in the same estate, but it [48] nowhere affirmatively appears that the claim of the defendant to the one-half interest claimed by the plaintiff arises out of the lease of Holt, trustee, to Gear, or out of the deed of Sumner to Cartwright. It might easily be, for example, that defendant claims under a prior lease from Holt, trustee, or under some conveyance to him of a fee or of a life estate in the land under lease from Cartwright; under a lease from Sumner or under other innumerable and possible sources of title. All these claims would be admissible under the answer of the defendant, and all such claims are sought to be quieted in the action at bar. The

action seeks to quiet the title of the plaintiff in and to the one-half interest in the term of years claimed by the plaintiff, and the source of the claim of the defendant is to the plaintiff immaterial, he praying only that his own title may be quieted as against the defendant.

On motion of the plaintiff, after closing his case, the Court permitted the case to be reopened for the purpose of introducing further evidence tending to show that the defendant herein claimed through the lease of Holt, trustee, to Cartwright, and not otherwise. Pursuant to this permission, plaintiff introduced the records in a certain case of Cecil Brown, Trustee, against Robert Wyllie Davis, Equity No. 1828, containing the answer of the defendant therein, the same Davis as the defendant herein. This answer sets up, among other things, a claim by the defendant that he is possessed of a life estate in the lands here in question by and through the deed of Sumner to Cartwright, trustee, and that said deed granted to him, Davis, a life estate in that land free and clear of all trusts. This answer is not dated, but was filed in this court on July 24, 1912. Plaintiff further offered certain conversations between the plaintiff and counsel for the defendant of a later date [49] to show a continuation of such claim up to that date, but the Court refused the offer, it appearing that such conversations were by way of compromise, and therefore, privileged and that they did not come within the rules relating to independent admissions occurring in negotiations of com-

promise. Irrespective of such admissions, the presumption of continuance would apply and this Court would, in the absence of any evidence to the contrary assume that the defendant still claimed to be entitled to a life estate by reason of the workings of the Statute of Uses of the Sumner trust deed. The same claim is strongly urged by the defendant in the present case on his motion for nonsuit, but this does not to my mind cure the vice above set out, nor make it "substantially appear that both plaintiff and defendant claimed from a common source of title." There can be no doubt that defendant does claim a life estate by reason of the execution of the trust, but it does not appear whether or not he furthermore claims other rights and estates in the land from other sources of title. The newly introduced evidence, therefore, does not, to my mind, change the status of the case, and I am compelled to find that plaintiff has not affirmatively shown that both parties claim from a common source of title, and that plaintiff is not, therefore, relieved from the necessity of deraigning his title from the Government or showing an adverse possession thereof for the statutory period.

Third, the evidence of the plaintiff affirmatively shows that at the time of the execution of the trust deed by Sumner to Cartwright there was an outstanding lease of the land in question. There is no showing that this lease had terminated at the time of the execution by Holt, trustee, of the lease to Gear above mentioned. [50]

The rule of "presumption of continuance" in its broadest terms is stated as follows: "When things are once proved to have existed in a particular state, they are presumed to continue in that state until the contrary is established by evidence either direct or presumptive." (Jones, Ev., sec. 58.)

In the case of *Lind v. Lind*, 53 Minn. 48, 51, this presumption was held controlling as to title to land in the lack of other evidence over a period of fourteen years, and although another was in possession of such land for a portion of the time, the Court being evidently of the opinion that the presumption of continuance overcame the presumption which flows from possession.

Against this presumption plaintiff sets up the presumption that the lease of Holt, trustee, was rightfully and not wrongfully made. I do not understand that there is any presumption that a trustee in giving a lease to a third party acted in any different manner than any other person or that there is any special presumption arising in such cases. There is a general presumption undoubtedly that men act rightfully and not wrongfully, but I am of the opinion that such presumption will not overcome the presumption of a continuance of ownership when that ownership is once shown by the evidence.

Nor do I think that plaintiff is relieved from his burden of proof by reason of the fact, as he claims, that it was not necessary for him to put in evidence the trust deed of Sumner to Cartwright. The deed is in evidence as part of his case and affirmatively

shows an outstanding lease. Furthermore, as I have already held, the lease of Holt trustee, to Gear does not affirmatively appear to be the common source of title, and plaintiff was, therefore, obliged to put in the trust deed as part of his title.

Plaintiff claims that the defendant is now estopped [51] from claiming the benefit of a failure of proof.

This estoppel it is claimed arises from two sources; (1) that a tenant in common cannot deny his landlord's title, and that, therefore, the defendant herein cannot now deny that Holt, trustee, had title in him to give the lease above referred to; and (2) that the defendant having joined in that lease by way of consent and having likewise assented to the mesne conveyances by which plaintiff became possessed of his one-half interest he thereby misled the plaintiff to his hurt and is estopped at this time to deny the validity of plaintiff's title.

As to the first ground of estoppel, such cannot at this stage of the case concern us. The defendant is evidently disputing the title of plaintiff, who claims as his, the defendant's, cotenant, but until it appears that the defendant *entered into possession* of the lands in question as a cotenant of the plaintiff, no estoppel will arise against his pleading a lack of title in his cotenant, the plaintiff herein. (Cooper v. Fox, 67 Miss. 237, 7 Sou. 343.) As I have heretofore remarked, there is no showing under what defendant claims his title.

Nor, if the defendant were actually in possession

of the land or an undivided portion thereof at the time of the lease to Gear and thereafter accepted an assignment from Gear of a one-half interest in said lease and acknowledged Gear as a cotenant, would he be estopped to claim that such cotenant had no title. (Washington v. Conrad, 21 Tex. 562.) It does not yet appear whether or not Davis was in possession at the time of the lease to Gear.

The same holds true of the relation between the defendant and Holt, trustee. The evidence shows an assignment [52] of one-half of the Gear estate for years to the defendant. This assignment, although it contains covenants on the part of the defendant, is not signed by the defendant, is not acknowledged nor recorded, and was brought into the case from the possession not of the defendant, but of the plaintiff. There is no evidence that the assignment was ever accepted by the defendant or that the defendant went into possession of the land by reason of or under that assignment. These things must be shown before the well recognized estoppel between a landlord and his tenant arises.

This brings us to the second alleged cause of estoppel, namely, the estoppel claimed by reason of the acts of the defendant in joining in the lease from Holt, trustee, to Gear, under which lease plaintiff now claims. That joinder is in the following words: "Know All Men By These Presents, that I, Robert Wyllie Davis of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the

same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned deed of trust.” (Signed) “Robert Wyllie Davis.” (No signature of wife.)

If this is to act as an estoppel, the elements of estoppel must be present. These elements of estoppel (Pomeroy Eq. Jur., sec. 805; II Pom. Eq. Jur., 3 ed., p. 1423) include, “(5) the conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.” There is no evidence in the case at bar tending to show that the plaintiff herein either relied on this consent of the defendant to the lease in question, or, relying thereon, was led to act upon it. Without such evidence, the defendant cannot be held to be estopped by [53] his act of consent and ratification.

I am, therefore, of the opinion that the motion for a nonsuit should be granted, and it is so ORDERED.

(Signed) WM. L. WHITNEY,

Second Judge.

Honolulu, T. H., December 22d, 1913.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Frederick Harrison, v. Robert Wyllie Davis. Decision on Motion for Nonsuit. Filed 10:15 A. M. December 22, 1913. (Signed) Henry Smith, Clerk. [54]

[**Exception to Decision on Motion for Nonsuit.**]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

Law No. 7783.

FREDERICK HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

EXCEPTION TO DECISION.

Comes now the plaintiff above named by Thompson, Wilder, Watson & Lymer, his attorneys, and excepts to the decision on defendant's motion for nonsuit, herein entered on the 22d day of December, 1913, and to each and every part of said decision.

Dated Honolulu, this 23d day of December, 1913.

FREDERICK HARRISON,

By THOMPSON, WILDER, WATSON &
LYMER,

(Signed) W. B. L.,
His Attorneys.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Frederick Harrison, Plaintiff, v. Robert Wyllie Davis, Defendant. Exception to Decision. Filed Dec. 23, 1913, 3:35 o'clock P. M. (Signed) J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11

Campbell Block, Honolulu, Attorneys for Plaintiff.

[55]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE.

L. No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT T. WYLLIE DAVIS,

Defendant.

Judgment [in Circuit Court, Territory of Hawaii].

This action by petition wherein plaintiff claimed to be entitled to one undivided half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of "Mokapu," and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances of the Territory of Hawaii at Honolulu, in Book 343, pages 347-351, came on regularly for hearing before this Court on this 17th day of October, A. D. 1913, when the parties appeared personally and by their respective attorneys and were at issue and ready for trial before the Court, jury having been waived;

And evidence both oral and documentary having

been admitted and adduced by the plaintiff herein, and he having rested, and the defendant having moved for a nonsuit upon the ground (1) that the evidence of the plaintiff showed affirmatively that there was a lease outstanding when the lease to Gear, under which plaintiff claimed, was made by Holt, Trustee; (2) that plaintiff had failed to deraign his title [56] from the government; (3) that the Statute of Uses had executed the trust, and that the defendant was the owner of a life interest in the property, and that therefore the lease of Holt Trustee, was invalid;

And the Court having granted such motion of defendant for a nonsuit;

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff take nothing by his said action, and that the complaint of plaintiff herein be dismissed, without prejudice, and that defendant have and recover of plaintiff his costs herein taxed at the sum of \$29.00.

Dated this 2d day of January, A. D. 1914.

By the COURT,
(Signed) J. MARCALLINO,
Clerk.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. L. No. 7783. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robert W. Davis. Judgment. Filed Jan. 2, 1914, 2:30 o'clock P. M. (Signed) J. A. Dominis, Clerk. [57]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

L. No. 7783.

FREDERICK HARRISON,

Plaintiff,

vs.

ROBERT T. WYLLIE DAVIS,

Defendant.

**Exception to Judgment [in Circuit Court, Territory
of Hawaii].**

Comes now the plaintiff above named by Thompson, Wilder, Watson & Lymer, his attorneys and excepts to the judgment granting defendant's motion for nonsuit herein entered on the 2d
W. B. L. day of January 1914, and to each and every part of said judgment.

Dated Honolulu this 2d day of January, 1914.

FREDERICK HARRISON.

By **THOMPSON, WILDER, WATSON & LYMER,**

(Signed) W. B. L.,

His Attorneys.

[Endorsed]: L. 7783. Reg. 4 Pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Frederick Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Exception to Judgment. Filed Jan. 2, 1914, at 2:30 o'clock P. M. (Signed) J. A. Dominis, Clerk. [58]

[Opinion of Supreme Court, Territory of Hawaii.]

In the Supreme Court of the Territory of Hawaii.

October Term, 1913.

FRED HARRISON

v.

ROBERT WYLLIE DAVIS,

EXCEPTIONS FROM CIRCUIT COURT, FIRST
CIRCUIT.

Argued February 16, 1914. Decided March 6, 1914.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

Evidence—Admissions in Pleadings in Another Suit.

The allegations in a pleading in one suit, while open to explanation or rebuttal, are receivable as against the party in a subsequent suit as his solemn admission of the truth of the facts so alleged.

Quieting Title—Admission in Pleadings in Another Suit as Proof of Title.—Upon the trial in a statutory action to quiet title the defendant's admission in a pleading in another suit of the truth of the fact that at a time stated the title was in a person from whom the defendant then claimed and from whom the plaintiff also claims in the action on trial constitutes evidence, available to the present plaintiff, of the fact mentioned and is *prima facie* proof of that fact.

Trusts—Statute of Uses—Trust to Protect Estate.—

If the purpose of a trust is to protect the estate for a given time or until the death of some one,

the operation of the statute of uses is excluded and the trusts or uses remain mere equitable estates. [59]

Trusts—Ratification of Lease by Trustee—Waiver of Right to Occupy Trust Property.—Where land is conveyed in trust to pay the rents, issues, and profits to D during his life “or in the discretion” of D “to permit him to reside upon” the land “and while so residing to use the same for grazing or agricultural purposes,” ratification by D of a lease by the trustee to another operates as a waiver of D’s right to reside upon and use the land in the manner mentioned. [60]

OPINION OF THE COURT BY PERRY, J.

This is a statutory action to quiet the title to a certain tract of land known as “Mokapu” and situate in the district of Koolaupoko on this island. The plaintiff claims an undivided one-half interest under a lease for a term of twenty-five years from June 1, 1910. At the trial he adduced evidence tending to show the following facts: that on August 16, 1892, John K. Sumner conveyed the land in question to Bruce Cartwright in trust “in the first place to pay the rents, issues and profits arising therefrom or thereout so long as the lease now in existence is in force” to the grantor “and upon the expiration of the present lease or other sooner determination thereof to pay the rents, issues and profits arising from or out of said land” to the grantor’s nephew Robert Wyllie Davis, the present defendant, “during the term of his natural life or in the discretion of the

said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes; and in the second place from and after the death of the said Robert Wyllie Davis to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten and failing such heirs of his body, then to the wife if living of the said Robert W. Davis, and failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis share and share alike"; that Cartwright resigned as trustee and that John D. Holt, Jr., was on August 29, 1902, appointed as his successor by a court of equity; that on June 1, 1910, Holt as trustee executed a lease of the property to A. V. Gear for 25 years from June 1, 1910, the lessor consenting that the lessee should "have peaceable and quiet possession of said land during said term"; that not later than August 4, [61] 1910, the defendant signed and acknowledged the following statement, apparently as a part of the same transaction, and in any event relating to the lease just mentioned: "Know all men by these presents, that I, Robert Wyllie Davis of Mokapu, Koolau-poko, Island of Oahu, and I, Mary Kealohanui Davis wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust"; that on June 16, 1910, A. V. Gear executed an assignment to defendant of an undivided one-half interest in the Holt lease and in the premises thereby

demised, the instrument of assignment not appearing, however, to have been signed by defendant; that A. V. Gear's remaining undivided one-half interest in the lease and in the demised premises passed by successive assignments to C. A. Peterson and to Addie B. Gear and finally, on October 21, 1910, to the plaintiff.

At the conclusion of the plaintiff's case the defendant moved for a nonsuit on the following grounds: "(1) that the evidence of the plaintiff showed affirmatively that there was a lease outstanding when the lease to Gear, under which plaintiff claimed, was made by Holt, Trustee; (2) that plaintiff had failed to deraign his title from the Government; (3) that the Statute of Uses had executed the trust, and that the defendant was the owner of a life interest in the property, and that therefore the lease to Holt Trustee, was invalid; (4) that the plaintiff had failed to show, nor is there any evidence tending to show that the plaintiff is entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu as set forth in Paragraph 1 of the Complaint; (5) that the plaintiff has failed to show and there is no evidence either competent or otherwise [62] tending to show that plaintiff had any interest in the land known as Mokapu aforesaid." The motion was granted on the first and second grounds. Plaintiff excepts. The grounds of the motion will be considered in their order.

1. The deed of trust introduced in evidence by the plaintiff did tend to show that at the date of its execution a lease of Mokapu was outstanding. That

lease, undoubtedly, while in force would be effective as against any lease executed by the trustee. Assuming that from the mere fact of the existence of the earlier lease a presumption could be indulged in of the continuance of that lease in force until the contrary was shown, that presumption was sufficiently overcome, *prima facie*, by the plaintiff. He introduced in evidence the answer filed by this same defendant in July, 1912, in a partition suit in which the present plaintiff was in interest the real party plaintiff. In that answer the defendant, after reciting the Sumner deed of trust, alleged that "pursuant to said trust deed, with the permission of the grantee therein named, this respondent on said last named day" (August 16, 1892) "went into possession of said premises to reside thereon and use the same for grazing and agricultural purposes and ever since has been in possession thereof and residing thereon and using the same for grazing and agricultural purposes." This constituted an admission on the defendant's part that as early as August 16, 1892, the lease referred to in the deed of trust ceased in some manner to exist. Without a determination of that lease, the defendant could not, whether with or without the trustee's "permission," have exercised the discretion vested in him by the trust deed to reside upon the land, take possession of it and use it for grazing or agricultural purposes. This admission was competent evidence of the determination [63] of the earlier lease and until rebutted is sufficient to sustain plaintiff's case upon the point.

2. Ordinarily, upon an issue of title, the plaintiff introduces evidence to prove that his title was in its inception derived from the Government and thence passed to him by mesne conveyances, devise, descent or adverse possession. In the case at bar there was no evidence tending to show how the title passed from the Government to Sumner. The plaintiff's claim is that it was not necessary for him to deraign title from the Government, because by the introduction of this defendant's answer, already referred to, in the suit for partition, he had shown that both parties to the litigation claimed title from the same source, that is, from the Sumner deed of trust. The defendant, on the other hand, calls attention to the fact that neither in his answer nor otherwise in the case at bar has he disclosed from what source he now claims title and that therefore the rule invoked by the plaintiff is inapplicable. It is doubtless well established that, as it has been variously stated, "when it appears in an action of ejectment that both parties claim title from the same grantor neither can take advantage of alleged defects in the chain of title prior to the common source" (*McCandless v. Plantation Co.*, 19 Haw. 239); "if both parties claim title from the same source, neither is at liberty to deny that such person had title" (*Gaines v. New Orleans*, 6 Wal. 642, 715); "a party is estopped from denying a title under which he claims to derive his own right to the premises" (*Carson v. Dundas*, 39 Neb. 503, 510). In the cases in which this rule is enforced in its entirety, the defendant has asserted, in the very action in which

title is being tried, his claim to the title solely as coming from the common source. The rule itself is simply an application of the principle of estoppel. In the case at bar [64] the defendant has not yet disclosed from what source he claims to derive title. The mere fact that in the suit for partition he pleaded a title derived from Sumner does not estop him from setting up, if he can, a title superior in its origin to Sumner's. All that was required of him in the suit for partition, in order to obtain a trial at law, was to show that he disputed in good faith the plaintiff's claim of title. He may now continue in equal good faith, to dispute the title, even though he sets up a claim of a different or superior title. The rule of estoppel does not apply and proof that Sumner had title was therefore necessary. A *prima facie* showing of that fact was made, however, by the plaintiff by the introduction in evidence of the defendant's answer in the partition suit. In that document, signed by the defendant personally, he alleged that on "the 16th day of August, 1892, one John K. Sumner, for a good and valuable consideration, by indenture of deed of even date" (further describing it) "did grant, bargain and sell unto one Bruce Cartwright, his heirs and assigns forever, said piece or parcel of land called and known as 'Mokapu,' in trust," setting forth the same trusts above recited. The allegations in a pleading in one suit, while open to explanation or rebuttal, are receivable against the party in a subsequent suit as his solemn admission of the truth of the facts so alleged. 11 A. & E. Ency. L.

449; 1 Greenleaf, Ev., § 212; *Blanks v. Klein*, 53 Fed. 436, 438. The allegation just quoted from the answer in partition was a solemn admission by defendant of the truth of the fact that Sumner did by the trust deed convey to the trustee the title to Mokapu and therefore, by necessary [65] inference, of the further fact that immediately prior to the execution of the deed the title was in Sumner. The defendant may, if he can, explain or rebut his admission, but until he does so it stands as a *prima facie* showing of title in Sumner at the time mentioned. See *Anderson v. Reid*, 10 App. Cs., D. C. 426, 429; *Smith v. Lindsey*, 89 Mo. 76, 79, 80; *Bonds v. Smith*, 106 N. C. 553, 565; *Brown v. Brown*, 45 Mo. 412, 415; 2 Greenleaf, Ev., § 307. It may be added that in some of the decisions on the subject there is, perhaps, an inexactness of statement, resulting in an apparent confusion of the rule, on the one hand, that evidence of title back of the common source is not necessary when both parties at the trial claim solely from the common source and when, therefore, each is estopped to deny that the title was in the common source and of the principle, on the other hand, that a defendant's solemn admission in a pleading in another suit of the truth of the fact that the title was in the so-called common source constitutes evidence, available to his adversary, of that fact; but none of them, as far as we are aware, can be properly regarded as authorities against the view here adopted.

3. Under the third ground of the motion for a nonsuit the defendant's contention is that "the trust as to the life estate to Davis is a mere passive one and

the use must be considered as executed"; that "an absolute life estate vested" in Davis and that "hence the lease to Gear was a nullity, the legal and equitable estate was merged in Davis and Holt had no title and could give no title." It is settled in this jurisdiction that to the application of the statute of uses "there are certain well-defined exceptions or rather rules of construction which limit the effect of the statute," that special or active trusts were never within the purview of the statute and that "if the purpose of the trust is to protect the estate for a given [66] time or until the death of some one, * * * the operation of the statute is excluded and the trusts or uses remain mere equitable estates." *Estate of Boardman*, 5 Haw. 146, 147; *Kidwell v. Godfrey*, 14 Haw. 138, 140. The trust under consideration was, after the termination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life or in the discretion of Davis to permit him to reside upon the land and while so residing to use it for grazing or agricultural purposes. The right was not granted to Davis to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate even as against Davis himself at least until the death of Davis, and thereafter to convey the remainder to those entitled under the terms of the instrument.

Even as to the interests of Davis, this was not a mere passive trust. The trustee had active duties to perform for the protection of the property and the trust as to Davis is not within the operation of the statute.

4 and 5. In the light of the rulings above made the plaintiff made a *prima facie* showing of ownership of at least an undivided one-half interest in the lease from Holt. It need only be added that the possibility of the Holt lease being inoperative by reason of an exercise by Davis of his right to reside on the property and to use it for grazing or agricultural purposes was excluded, *prima facie*, by plaintiff's proof that Davis executed the document already referred to whereby he consented to the lease and ratified and confirmed it. Whatever other legal effects may be attributable to that document, it was operative [67] at least as a waiver by Davis of his right to reside upon and so use the property.

The exceptions are sustained, the judgment set aside and the cause remanded with directions to deny the motion for a nonsuit and to take such further proceedings, not inconsistent with this opinion, as may be appropriate.

W. B. LYMER (THOMPSON, WILDER,
WATSON & LYMER, on the Brief), for
Plaintiff.

E. C. PETERS, for Defendant.

ANTONIO PERRY.

J. T. DEBOLT. [68]

CONCURRING OPINION OF ROBERTSON, C. J.

I concur in the opinion of the majority of the court, but desire to place my concurrence on the

second point upon a different ground. In an action of ejectment or to quiet title to land it is incumbent on the plaintiff to prove title and he ordinarily does that by deraigning the title from its origin. But where there is a subsequent common source from which both plaintiff and defendant claim title to the premises in dispute the state of the title anterior to that source is immaterial since though it be defective the defendant would be estopped from taking any advantage of the defect. The fact that the parties claim title from a common source may be made to appear by stipulation as in the case of *Nahaolelua v. Heen*, 20 Haw. 613, or by evidence adduced by the defendant as in the case of *McCandless v. Honolulu Plant. Co.*, 19 Haw. 239. In the case at bar there was no stipulation between the parties, but counsel for the plaintiff contend that the plaintiff could and did show *prima facie* that he and the defendant do claim from a common source, namely, the deed from Sumner to Cartwright. I think that this contention is correct. The cases of *Anderson v. Reid*, *Smith v. Lindsey* and *Bonds v. Smith*, cited in the majority opinion, show that the plaintiff in a case of this kind, instead of tracing his title back to its original source, may show that there is an intermediate common source of claim and then trace his title down from that source, as was done here. The following cases are to the same effect, *Mobley v. Griffin*, 104 N. C. 112, 115; *Laidley v. Land Co.*, 30 W. Va. 505, 509; *Finch v. Ullman*, 105 Mo. 255; *Mitchell v. Cleveland*, 57 S. E. (S. C.) 33. In *Holbrook v. Brenner*, 31 Ill.

501, 511, the Court said: "When it is found that the defendant has purchased by deed, and is in possession of the [69] premises, it is *prima facie* evidence that he claims under that title. And if he and plaintiff claim from the same source, it is not necessary for the latter to trace his title further in the first instance. When he exhibits a title from the same source better than that of the defendant, it is sufficient to put him upon his defense." And in *Millis v. Roof*, 121 Ind. 360, 363, it was held that "If the defendant asserts any other or superior title, or a title adverse to that under which plaintiff claims, it lies upon him to bring it forward." See also 2 Greenleaf, Ev., sec. 307.

The statement contained in the answer of the defendant in the partition suit that he entered and took possession of the land pursuant to the trust deed to Cartwright was evidence that that deed is the source of title under which he claims as well as being the source of the plaintiff's claim. In other words, a common source of title was shown. The defendant may, if he can, show in defense that his title from the common source is as good or better than that of the plaintiff, or that he has and claims under another and superior title. But when the plaintiff rested he had made out a *prima facie* case, and the nonsuit should not have been granted.

A. G. M. ROBERTSON.

[Endorsed]: No. 757. Supreme Court, Territory of Hawaii. October Term, 1913. Fred Harrison v. Robert Wyllie Davis. Opinion. Filed March 6, 1914, at 2:12 P. M. J. A. Thompson, Clerk. [70]

In the Supreme Court of the Territory of Hawaii.

October Term, 1913.

FRED HARRISON,

Plaintiff-Appellant,

vs.

ROBERT WYLLIE DAVIS,

Defendant-Appellee.

**[Notice of Decision of Supreme Court, Territory of
Hawaii, on Exceptions.]**

**EXCEPTIONS FROM CIRCUIT COURT, FIRST
CIRCUIT.**

To the Honorable WILLIAM L. WHITNEY, Sec-
ond Judge of the Circuit Court of the First
Judicial Circuit, Territory of Hawaii.

You will please take notice that the Supreme
Court in the above-entitled cause has made the fol-
lowing decision on exceptions:

“DECISION ON EXCEPTIONS.

“In the above-entitled cause, pursuant to the
opinion of the above-entitled court, filed March 6,
1914, the plaintiff’s exceptions are sustained, the
judgment set aside and the cause remanded with
directions to deny the motion for a nonsuit and to
take such further proceedings, not inconsistent with
said opinion, as may be appropriate.”

Dated Honolulu, T. H., March 7, 1914.

By the Court,

[Seal]

(Sig.) J. A. THOMPSON,
Clerk Supreme Court. [71]

Certificate.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing document and attached hereto is a full, true and correct copy of the original “Notice of Decision on Exceptions” which is now on file in the office of the clerk of the Supreme Court in the foregoing-entitled cause (Number 757).

Witness my hand and the seal of said court at Honolulu, city and county of Honolulu, this 7th day of March, A. D. 1914.

[Seal] (Signed) J. A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

[Endorsed]: L. 7783. Reg. 4, pg. — Circuit Court First Circuit Territory of Hawaii. Fred Harrison, Plaintiff-Appellant, vs. Robert Wyllie Davis, Defendant-Appellee. Notice of Decision on Exceptions. Filed Mar. 7, 1914, 12 M. o'clock *P. M.* J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff-Appellant. [72]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

L. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

DECISION.

This statutory action to quiet title to an undivided one-half interest in the term for years mentioned and described in the Bill of Complaint herein, being a 25-year term from June 1, 1910, in the land known as Mokapu, was commenced by the filing in this court on June 12th, 1913, of the plaintiff's Bill of Complaint. An answer of general denial having been filed by defendant and the cause coming on to be tried, and the plaintiff having adduced certain evidence, documentary and oral, in his behalf, and having rested his case, the defendant moved for a judgment of nonsuit against plaintiff which this Court granted and said judgment of nonsuit was duly made, entered and filed herein on January 2d, 1914.

The defendant thereafter, by Bill of Exceptions, caused said judgment to be reviewed by the Supreme Court of the Territory of Hawaii, which Court, by its opinion rendered March 6, 1914, held that the action of this Court in entering said judg-

ment of nonsuit against the plaintiff herein, constituted error, and specifically deciding that the said plaintiff had made out a *prima facie* case by the evidence he had adduced. In this connection the Supreme Court expressly stated (in the concurring opinion of the Chief Justice, 22 Haw. 59) that, upon the further trial of the cause, "the defendant may, if he can, [73] show in defense that his title from the common source is as good or better than that of the plaintiff, or that he has and claims under another and superior title." Other language on page 55 of the Supreme Court's opinion seems declarative of the principle (which this Court considers sound) that, in the case at bar, the only proper defense on the part of defendant to plaintiff's *prima facie* case, would be a showing on defendant's part, of an equal or superior title in himself in the term for years as to which title is sought to be quieted.

The defendant, on the resumption of the trial of this cause after the judgment of nonsuit was vacated, offered in evidence, over plaintiff's objection, a deed of an undivided one-half of the land of Mokapu, from defendant and his wife to John K. Sumner, dated January 1, 1906, and recorded in Liber 302, at page 192 of the Hawaiian Registry of Conveyances; and a mortgage of an undivided one-half of said land from defendant and his wife to the said Sumner, dated January 2, 1906, and recorded in Liber 303 at page 91 of said Registry.

The Court reserved its ruling on the admissibility of said documents.

Defendant then offered certain oral evidence as to the transfer of defendant's interest under said documents and on the nature of the alleged residence on and possession of the land of Mokapu by the said Sumner pursuant to said transfers.

Defendant then having rested without offering any other substantial evidence, and the matter of the admissibility of said evidence having been argued at length and taken under advisement by the Court, the Court ruled, in open court on June 23d, 1914, at a further hearing of the above-entitled cause, that said documents, constituting evidence solely of title in a stranger and not tending in any manner to show in defendant a title in and to the land of Mokapu equal or superior to that of plaintiff, [74] were inadmissible in evidence, as well as the oral evidence of residence on or occupation of Mokapu by the said Sumner, for the same reasons. Said documents and evidence being excluded from the case, there is no substantial evidence which in any degree tends to rebut the *prima facie* case heretofore established by the plaintiff, and judgment should accordingly be entered for plaintiff.

Let judgment enter for plaintiff for an undivided one-half interest in said term *for* years and for costs.

(Signed) WM. L. WHITNEY,
Second Judge, First Circuit Court.

Dated at Honolulu, this 25th day of June, A. D.
1914.

[Endorsed]: L. No. 7783. Reg. 4, pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Decision. Filed Jun. 25, 1914, 2:20 o'clock P. M. (Signed) J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 2-11, Campbell Block, Honolulu, Attorneys for Plaintiff. [75]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Judgment.

This cause coming on to be heard, jury waived, and the parties being at issue and appearing before the Court in person and by their respective attorneys, and the Court having heard the parties and having, on the 25th day of June, 1914, rendered its decision in writing finding for the plaintiff for an undivided one-half interest in and to the term *for* years described in plaintiff's Bill of Complaint; it is therefore

ORDERED, ADJUDGED, AND DECREED that the plaintiff is the owner and entitled to the immediate possession of an undivided one-half for a term

of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances, in said Honolulu, in Book 343, at pages 347-351;

That plaintiff's title and ownership in said undivided one-half interest in said term for years is quieted and confirmed accordingly; [76]

And that plaintiff is entitled to have and recover against defendant his costs in this action taxed in the sum of \$41.75.

Done at Honolulu, T. H., this 26th day of June, A. D. 1914.

By the Court.

(Signed) A. K. AONA,

Clerk.

Let judgment issue.

(Signed) WM. L. WHITNEY, 2d J.

[Endorsed]: L. No. 7783. Reg. 4, pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Judgment. Filed June 26, 1914, at 9:50 A. M. (Signed) A. K. Aona, Clerk. Thompson, Wilder, Watson & Lymer, 2-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [77]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

LAW NO. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Exception to Decision.

Now comes the defendant named in the above-entitled cause and hereby *enter* this his exception to *to* the decision of the Honorable William L. Whitney, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, heretofore rendered, entered and filed herein on the 25th day of June, A. D. 1914, as being contrary to the law and the evidence and to the weight of the evidence.

Dated this 30th day of June, A. D. 1914.

(Signed) E. C. PETERS,

Attorney for Robert Wyllie Davis.

The foregoing exception is hereby allowed.

(Signed) WM. L. WHITNEY,

Judge Presiding at the Trial.

[Endorsed]: Service of the within exception to decision is hereby admitted this 30th day of June, A. D. 1914. Thompson, Wilder, Watson & Lymer. (Signed) W. B. L., Attorneys for Plaintiff. L. No. 7783. Circuit Court, First Circuit, Territory of

Hawaii. Fred Harrison vs. Robert Wyllie Davis.
Exception to Decision. Filed at 5:30 P. M. June
30, 1914. (Signed) Henry Smith, Clerk. E. C.
Peters, 210-211 McCandless Building, Honolulu,
T. H., Attorney for Defendant. [78]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

LAW NO. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Exception to Judgment.

Now comes the defendant named in the above-entitled cause and hereby *enter* this his exception to the judgment of the Court heretofore entered, filed and docketed herein on the 26th day of June, A. D. 1914, as being contrary to the law and the evidence and to the weight of the evidence.

Dated at Honolulu, T. H., this 30th day of June, A. D. 1914.

(Signed) E. C. PETERS,
Attorney for Robert Wyllie Davis.

The foregoing exception is hereby allowed.

(Signed) WM. L. WHITNEY,
Judge Presiding at the Trial.

[Endorsed]: Service of the within exception to judgment is hereby admitted this 30th day of June, A. D. 1914. Thompson, Wilder, Watson & Lymer. (Signed) W. B. L., Attorneys for Plaintiff. L. No. 7783. Circuit 4/263 Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robert Wyllie Davis. Exception to Judgment costs, 31.25. Filed at 5:30 P. M. June 30, 1914. (Signed) Henry Smith, Clerk. E. C. Peters, 210-211, McCandless Building, Honolulu, T. H., Attorney for Defendant. [79]

[Minutes—October 17, 1913.]

Friday, October 17th, 1913.

At 9 A. M. The Court Convenes.

Present: Honorable WILLIAM L. WHITNEY,
Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT W. DAVIS,

Defendant.

CLERK'S MINUTES.

TRIAL.

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

Counsel for the parties waive trial by jury in open court.

Mr. Lymer calls George C. Kopa, sworn.

Mr. Lymer offers in evidence Equity Record No. 1293, First Circuit Court records. Received in evidence for Identification, subject to ruling of the Court as to its admissibility as evidence.

Mr. Lymer offers in evidence copy of record in Liber 343 pages 347-351. Received and marked Plaintiff's Exhibit "A" for Identification.

Fred Harrison, sworn.

Mr. Peters offers in evidence Equity Record #1814 F. Harrison [80] vs. A. V. Gear. Received in evidence.

Mr. Peters offers in evidence Mortgage dated October 24, 1910, Addie B. Gear to F. Harrison. Received and marked Defendant's Exhibit 1.

Mr. Peters offers in evidence Mortgage November 16, 1910, A. V. Gear to Fred Harrison. Received and marked Defendant's Exhibit 2 for Identification.

Mr. Lymer offers in evidence agreement June 6, 1913, Addie B. Gear and Fred Harrison. Received in evidence and marked Plaintiff's Exhibit "C."

William T. Rawlins, sworn.

A. V. Gear, sworn.

Mr. Lymer offers in evidence deed June 9, 1913, C. Brown, Trustee to F. Harrison. Received and marked Plaintiff's Exhibit "D."

11:47 P. M. The Court orders further trial herein continued till 2 P. M., at which time the Court further resits *and* in the trial of this case.

Counsel are present in court.

A. V. Gear resumes the stand.

Mr. Lymer offers in evidence assignment by A. V.

Gear to R. W. Davis dated June 16th, 1910. Received and marked Plaintiff's Exhibit "E."

2:27 P. M. Plaintiff rests.

Mr. Peters moves for a nonsuit on the ground that the plaintiff has failed to show, or offered any evidence tending to show that plaintiff is entitled completely or to an undivided one-half for a term of years till June 1, 1935, to the land of Mokapu as set out in paragraph 1 of the Complaint; 2d, that plaintiff has failed to show that he has any interest in the Land of Mokapu; 3d, that the alleged and pretended appointment of John D. Holt, Jr., Trustee, by a Judge of the First Circuit Court was and is null and void in this that the Circuit Court was without the jurisdiction; [81] 4th that it affirmatively appears from the evidence that at the time of the lease by J. D. Holt, Jr., Trustee, to A. V. Gear, defendant was entitled to a life estate free from any and all trusts.

Mr. Peters argues, concluding at 2:30 P. M.

Mr. Lymer argues, concluding at 2:42 P. M.

Mr. Peters replies, concluding at 2:56 P. M.

Mr. Lymer replies, concluding at 3:12 P. M.

Mr. Peters replies, concluding at 3:17 P. M.

The Court takes matter under advisement.

Mr. Wm. T. Tawllins is recalled by Mr. Lymer and examined in rebuttal.

3:35 P. M. The Court orders trial continued to follow the McQuen divorce case.

By the Court.

(Signed) J. MARCALLINO,

Clerk.

[Minutes—October 27, 1913.]

Monday, October 27th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,
Second Judge Presiding.
JOHN MARCALLINO, Clerk.
H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

CONTINUANCE.

The Court orders continuance herein till Friday,
October 31st, 1913, at 9 A. M.

By the Court.

(Signed) J. MARCALLINO,
Clerk. **[82]**

[Minutes—November 7, 1913.]

Friday, November 7th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,
Second Judge Presiding.
JOHN MARCALLINO, Clerk.
H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

CONTINUANCE.

W. B. LYMER, Esq., Appearing for Plaintiff.

R. J. O'BRIEN, Esq., Appearing for Defendant.

The Court orders this cause continued for further
argument on the motion for a nonsuit till Wednes-
day, November 12, 1913, at 9:30 A. M.

By the Court.

(Signed) J. MARCALLINO,

Clerk. [83]

[Minutes—November 12, 1913.]

Wednesday, November 12th, 1913.

At 9 o'clock A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

**FURTHER ARGUMENT ON MOTION FOR A
NONSUIT.**

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

Mr. Peters argues, concluding at 9:25 A. M.

Mr. Lymer argues, concluding at 10:25 A. M.

Mr. Peters replies, concluding at 10:54 A. M.

Mr. Lymer replies, concluding at 11:09 A. M.

Mr. Peters replies, concluding at 11:18 A. M.

The Court takes matter under advisement and orders further hearing continued till Friday, November 14, 1913, at 9 A. M.

By the Court.

(Signed) J. MARCALLINO,

Clerk. [84]

[Minutes—November 17, 1913.]

Monday, November 17th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

F. HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

FURTHER EVIDENCE.

Counsel for the parties are present in court.

Mr. Lymer presents motion and argues, concluding at 2:14 P. M.

Mr. Peters argues, concluding at 2:30 P. M.

Mr. Lymer replies, concluding at 2:44 P. M.

The Court grants the motion.

Mr. Peters notes an exception and moves that the Court reconsider the motion and deny the same on the ground that no specific evidence is offered.

The Court vacates and sets aside its order heretofore made and orders that the motion to reopen is granted and counsel will be permitted to put in evidence in that certain case being Equity No. 1828 and supplement the same by the testimony of plain-

tiff showing or tending to show that the condition existing at the time of filing the answer existed at the time of bringing this case.

The Court orders further hearing herein set for Wednesday, November 19th, 1913, at 2 P. M.

By the Court.

(Signed) J. MARCALLINO,
Clerk. [85]

[Minutes—November 19, 1916.]

Wednesday, November 19th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,
Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

2 P. M.

L. 7783.

ACTION TO QUIET TITLE.

F. HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

TRIAL CONTINUED.

Counsel for the parties are present in court.

Mr. Lymer offers in evidence Equity Record #1828 all the files and directing the Court's particular attention to the answer of R. W. Davis. Re-

ceived in evidence over the objection of Mr. Peters.
Fred Harrison is recalled.

Mr. Lymer offers in evidence Law record #7695,
C. Brown, Trustee, vs. R. W. Davis. Received in
evidence.

3 P. M. The Court takes matter under advise-
ment.

By the Court.

(Signed) J. MARCALLINO,
Clerk. [86]

[Minutes—March 14, 1914.]

Saturday, March 14th, 1914.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,
Second Judge Presiding.
JOHN MARCALLINO, Clerk.
H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

PLAINTIFF'S MOTION TO SET.

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

The Court grants the motion and orders this cause
set for trial for Thursday, April 2d, 1914 at 9 A. M.

By the Court.

(Signed) J. MARCALLINO.

[Minutes—April 8, 1914.]

Wednesday, April 8th, 1914.

At 8:40 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant. [87]

CONTINUANCE.

Counsel for the parties are present in court.

The Court orders this cause continued and reset for further trial for Monday, April 13th, 1914, at 2 P. M.

By the Court.

(JOHN MARCALLINO),

Clerk. [88]

[Minutes—April 13, 1914.]

Monday, April 13th, 1914.

At 8:30 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

FURTHER TRIAL.

Counsel for the parties are present in court.

George C. Kopa, sworn.

Robert W. Davis, sworn.

3:50 P. M. The Court orders further trial herein continued till Thursday, April 16th, 1914, at 9 A. M.

By the Court.

(Signed) J. MARCALLINO.

Clerk.

[Minutes—April 16, 1914.]

Thursday, April 16th, 1914.

At 10 o'clock A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer. [89]

L. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

TRIAL CONTINUED.

Counsel for the parties are present in court.

R. W. Davis, resumes the stand.

The Court denies defendant's motion for a nonsuit.

Mr. Peters notes an exception.

Mr. Peters offers in evidence, complaint in the case of C. Brown, Tr., vs. R. W. Davis, Equity #1828.

Received in evidence.

10:14 A. M. Defendant rests.

Mr. Lymer moves for judgment on the ground first, defendant in this case has not adduced sufficient evidence to meet the *prima facie* case established by plaintiff, and on the specific ground that the deed from Davis to Sumner dated January 1st, 1906, as well as the mortgage from Davis to Sumner dated Jan. 2d, 1906, are neither of them proper evidence

in this case, the deed and mortgage not showing or tending to show any defect in plaintiff's title to an undivided one-half of title *to an undivided one-half of title* to the term of years and being no defense which can be urged and further the deed and mortgage are not available to defendant, defendant being estopped to introduced evidence of this character, to wit, evidence of title to the rights to the land in Mokapu outstanding in a stranger or any evidence whatever of conveyance which have the trust deed as the source from which the title passed.

Counsel for the parties stipulate and agree to submit the motion to the Court on briefs.

By the Court.

(Signed) J. MARCALLINO,
Clerk. [90]

[Minutes—April 27, 1914.]

Monday, April 27th, 1914.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

JOHN MARCALLINO, Clerk.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

FURTHER TRIAL.

Counsel for the parties are present in court.

Mr. Lymer withdraws his motion for judgment and states that he desires to proceed with further evidence.

George C. Kopa, is recalled.

A. V. Gear, sworn.

4 P. M. The Court orders further trial herein continued til 2 P. M. to-morrow.

By the Court.

(Signed) J. MARCALLINO,
Clerk. [91]

[Minutes—April 28, 1914.]

Tuesday, April 28th, 1914.

At 2 P. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,
Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

FURTHER TRIAL.

Counsel for the parties are present in court.

On motion of Mr. Lymer, the Court orders the name of B. S. Ulrich entered of record as associate

counsel for the plaintiff.

A. V. Gear resumes the stand.

Counsel for the parties argues on the admissibility of certain evidence and agree to submit the matter on briefs. Counsel for defendant to file his brief within 3 days thereafter and counsel for defendant to file a reply brief within two days thereafter.

By the Court.

(Signed) J. MARCALLINO,
Clerk. [92]

[Minutes—June 23, 1914.]

Tuesday, June 23d, 1914.

At 2 P. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,
Second Judge Presiding.
JOHN MARCALLINO, Clerk.
H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

FURTHER TRIAL.

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

Mr. Lymer moves to amend the prayer of the complaint to read as follows:

“WHEREFORE plaintiff prays that defendant be summoned to appear and answer this complaint

at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that defendant may be required to set up any adverse claim which he may have in and to said undivided half of said term of years in said land; that defendant be forever barred from all claim and/or interest in said described undivided half of said term of years; that the title to said undivided half of said term of years may be quieted and the plaintiff's ownership therein may be confirmed, and that plaintiff be awarded his costs herein."

Mr. Peters objects to motion. The Court grants the motion. Mr. Peters notes an exception.

Mr. Lymer moves for judgment.

The Court orders judgment entered for the plaintiff for an undivided [93] one-half for a term of years as set out in the complaint.

Mr. Peters notes an exception to the decision as being contrary to the law and the evidence and the weight of the evidence.

By the Court.

(Signed) J. MARCALLINO,

Clerk. [94]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

EJECTMENT—L. No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Defendant's Bill of Exceptions.

BE IT REMEMBERED: That the within action at law to quiet the title of a term of years of and to the land of "Mokapu" came on for hearing before the Honorable William Whitney, Second Judge of this court, on Friday, October 17, 1913, jury waived.

The following proceedings were had:

George C. Kopa, a clerk in the office of the registrar of conveyances, produced and there was admitted in evidence a certain deed of trust from John K. Sumner to Bruce Cartwright (see Tr. I*, p. 2), dated the 16th day of August, 1892, and on the 17th day of August, 1892, recorded in the office of the registrar of conveyances of the Territory of Hawaii, in liber 136, pp. 136-7, wherein and whereby the trustor conveyed the land or "Mokapu" (the same land subject to term of years to which title is sought to be quieted in this action) in trust—

"In the first place, to pay the rents, issues and profits arising therefrom or thereat so long as the lease now in existence is in force to me, the said party of the first part, and upon the expiration of the present lease or other sooner termination thereof to pay the rents, issues and profits arising from or out of said land to my nephew, Robert Wyllie Davis, during the term of his natural life, or in the discretion of said Robert

(*The transcript, by reason of a previous appeal, is in two sections, and, hence, the use of the Roman numerals indicating same.) [95]

Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes. And, in the second place, from and after the death of said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis, lawfully begotten, and, failing such heirs of his body, then to the wife, if living, of the said Robert W. Davis; and, failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis, share and share alike.”

EXCEPTION NO. 1.

Mr. Kopa having been requested to turn to the records of his office and state what was recorded in liber 343, page 347 (Tr. I, p. 5), counsel for plaintiff, in lieu thereof, offered in evidence a certified copy of a lease dated June 1, 1910, from J. D. Holt, Trustee, to A. V. Gear, of the land described in the Sumner trust deed, with attached undated consent thereto by Robert Wyllie Davis, and mesne assignments thereof by said Gear to Charles F. Peterson, dated October 12, 1910, from the latter to Addie B. Gear, dated October 12, 1910, and from Addie B. Gear to the plaintiff Harrison, dated October 21, 1910. Said lease, consent and mesne assignments were recorded as aforesaid on May 6, 1911.

This offer was objected to by defendant as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in the case, and on the further ground that said Holt named as trustee was

not a trustee, but a pretended or fictitious trustee, and that he had no authority in law to give such a lease.

The ruling on this objection was reversed by the Court and the paper marked for identification as exhibit "A" (Tr. [96] I, p. 6).

Plaintiff, on cross-examination, admitted that the said assignment to him by Addie B. Gear, was given by way of mortgage to secure plaintiff as endorser of certain notes from A. V. Gear, her husband, to John K. Sumner (Tr. p. 9).

Thereafter, the several papers, comprising Plaintiff's Exhibit "A" for identification, were admitted in evidence, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. I, p. 19).

EXCEPTION NO. 2.

Further, on cross-examination of plaintiff, the record of his foreclosure proceedings against A. V. Gear and Addie B. Gear (Ex. No. 1814, First Circuit Court), as well as the security agreement between him and Mrs. Gear, dated October 24, 1910 (Defendant's Exhibit 1), having been admitted in evidence, he was asked whether or not he was the same Fred Harrison named as mortgagee in a purported mortgage given by A. V. Gear, dated the 16th of November, 1910, and upon which the proceedings in Equity Case No. 1814 were predicated, which question was objected to by plaintiff's counsel on the ground that the same was not proper examination, which objection was sustained by the Court, to which ruling of the Court defendant duly excepted and said exception

was allowed (Tr. p. 10). The instrument offered by defendant was received for identification and marked Defendant's Exhibit 2 for identification (Tr. p. 10).

EXCEPTION NO. 3.

The plaintiff was further asked on cross-examination whether or not he was the same person named in the certain chattel mortgage from Addie B. Gear to Fred Harrison, dated June 9, 1911, connected with his foreclosure proceedings [97] against A. V. Gear and Addie B. Gear, his wife, No. 1814, equity division, and recorded in liber 351, page 121. The question was:

“I want to call your attention to another document connected with this Equity Case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison named in that particular document.”

This question was objected to by plaintiff as not proper cross-examination, which objection was sustained by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. p.11).

EXCEPTION NO. 4.

The witness was further asked the following question on cross-examination:

Q. I will ask you if you are the same Fred Harrison named in a certain foreclosure deed, Fred Harrison, by Cecil Brown, on the 29th of February, 1912, and recorded in liber 366, page 140?

This question was objected to by plaintiff on the ground that the same was not proper cross-examination. Objection sustained by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed.

EXCEPTION NO. 5.

On redirect examination of the same witness, it appearing that Defendant's Exhibit 1 referred to certain notes which the plaintiff had endorsed and for whose security the conveyance, evidenced by Defendant's Exhibit 1, had been made, was asked the following question:

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear?

To this question defendant objected upon the ground that the same was immaterial and not proper redirect examination, but the objection was overruled by the Court. To this ruling [98] of the Court defendant duly excepted and said exception was allowed (Tr. I, p. 14).

EXCEPTION NO. 6.

The witness' attention on redirect was then called to a paper dated June 6, 1913, purported to be an assignment signed by Addie B. Gear, and asked whether his signature was appended thereto, which question defendant objected to on the ground that the same was incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in the case (Tr. I. p. 14). This objection was over-

ruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. p. 15).

EXCEPTION NO. 7.

Thereupon counsel for plaintiff offered in evidence agreement between Addie B. Gear and Fred Harrison, dated June 6, 1913, to which defendant objected on the ground that the same was incompetent, irrelevant and immaterial. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed.

Document so offered, was received and marked Plaintiff's Exhibit "C" (Tr. p. 15).

EXCEPTION NO. 8.

Thereupon plaintiff offered in evidence a deed from Cecil Brown, Trustee, to Fred Harrison, dated June 9, 1913, the record in Equity Case No. 1293, and the lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and an assignment of lease from A. V. Gear to Robert W. Davis dated June 16, 1910, to all of which defendant objected on the ground that the same was incompetent, irrelevant and immaterial, which objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed. [99]

EXCEPTION NO. 9.

Further, plaintiff offered in evidence assignment of A. V. Gear to Davis, the defendant, dated June 16, 1910, of an undivided one-half interest in and of his lease of "Mokapu," to which offer defendant objected on the ground that the same was incompetent,

irrelevant and immaterial and did not prove or tend to prove any of the issues in the case. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. I, p. 19).

The instrument was admitted as Plaintiff's Exhibit "E."

EXCEPTION NO. 10.

Plaintiff having rested, defendant moved for a nonsuit upon the following grounds:

1. That the plaintiff had failed to show, nor was there any evidence tending to show, that the plaintiff was entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint;

2. That the plaintiff had failed to show and there was no evidence, either competent or otherwise, tending to show that he had any interest in the land known as Mokapu aforesaid;

3. That the alleged and pretended appointment of one John D. Holt, or John D. Holt, Jr., by a Judge of the Circuit Court of the First Circuit, was null and void, in this that the Circuit Court was without jurisdiction to make such appointment; and

4. That it affirmatively appeared from the evidence that at the time of the execution of the alleged lease to the plaintiff, the defendant was possessed of a life estate [100] in the land so referred to as "Mokapu," free and clear from any and all trusts (Tr. p. 21).

The motion for a nonsuit was taken under advisement by the Court.

Thereafter, and while the motion for nonsuit was pending, upon motion made by plaintiff further evidence was permitted to be introduced by plaintiff (Tr. I, p. 27), to wit, permitted to put in evidence Equity Case No. 1828 (an action for partition brought by Cecil Brown, Trustee, v. Robert W. Davis, to partition the term of years subject to this action), and supplement the same by the testimony of the plaintiff, showing or tending to show that the condition existing at the time of filing the answer in that case existed at the time of bringing this case (Tr. I, p. 27).

EXCEPTION NO. 11.

Thereupon, plaintiff offered in evidence the files in case No. 1828, equity division of the Circuit Court of the First Judicial Circuit of this Territory, to which offer defendant objected on the ground that the same was incompetent, irrelevant and immaterial (Tr. I. p. 27), and not tending to prove or disprove any of the issues in the case. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exceptions was allowed (Tr. I. p. 28).

EXCEPTION NO. 12.

The plaintiff was then recalled as a witness on his own behalf, and was asked the following question:

“I will ask you this. In this foreclosure proceeding when the time came for a sale to be made, a commissioner’s sale under order of the Court, who bought in whatever interests were foreclosed in this proceeding?

This question was objected to on the ground that

the same was incompetent, irrelevant and immaterial. Objection [101] was overruled, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. pp. 28-29).

EXCEPTION NO. 13.

Further, the witness was asked the following question:

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title.

This question was objected to by defendant as immaterial. The objection was overruled, and to the ruling of the Court defendant duly excepted and the exception was allowed. (Tr. I, p. 31).

EXCEPTION NO. 14.

Thereupon plaintiff offered in evidence Law No. 7695 and this offer was likewise objected to by defendant as immaterial, but the objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed. (Tr. I, p. 31.)

EXCEPTION NO. 15.

Thereupon the witness was asked the further question on direct examination:

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When the nonsuit was granted, what, if anything, further did you do?

This question was objected to by defendant on the ground that the same was immaterial, but the objection was overruled by the Court. To this ruling of the Court defendant duly excepted and said exception was allowed (Tr., p. 31).

Thereafter the Court granted defendant's motion for nonsuit and the judgment for nonsuit was entered in this cause, but said ruling upon review by the Supreme Court was reversed (see 22 Haw. 51) and the cause remitted to the trial Court [102] for further proceedings in conformity with said opinion.

EXCEPTION NO. 16.

Thereafter the within cause came on to be heard and the motion of defendant for nonsuit, in conformity with the opinion of the Supreme Court, was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 14).

EXCEPTION NO. 17.

George K. Kopa, the same witness hereinbefore referred to as a clerk from the office of the registrar of conveyances, was called as a witness on behalf of defendant and asked to produce liber 302 of his office (Tr. II, p. 1) and state what he found on page 192 thereof. Having responded he found a deed by Robert Wyllie Davis and wife to John K. Sumner, he was asked to read it, but the question was objected to as incompetent, irrelevant and immaterial and upon the further ground that the defendant was estopped from introducing any such deed in evidence (Tr. II, p. 2). This objection was taken un-

der advisement and the ruling thereon reserved, and the answer to the question allowed in subject to being stricken upon announcement of the Court's ruling on the objection.

EXCEPTION NO. 18.

The deed referred to is dated the 1st day of January, 1906, and was recorded on March 4, 1908. It purports to convey to John K. Sumner for and in consideration of the sum of \$2,794.93, the undivided one-half ($\frac{1}{2}$) share and interest of the grantor in and to the land known as Mokapu, described particularly in the same manner as in the trust deed. Mrs. Davis, the wife of the grantor, also joined in the deed by way of release of all her right of and to dower (Tr. II, pp. 2, 3 and 4). [103]

Further, the same witness, on direct examination, was directed to liber 303 in his office, at page 91 (Tr. II, p. 4), and asked by defendant what the record disclosed. The witness answered that it disclosed a mortgage from Robert W. Davis and his wife, dated January 2, 1906, and recorded on March 4, 1908, wherein and whereby mortgagor conveyed by way of mortgage to John K. Sumner, all his undivided one-half ($\frac{1}{2}$) share and interest in and to the land of Mokapu, described by metes and bounds, to the same effect as contained in the trust deed above referred to. (Tr. II, pp. 4, 5.) This evidence was also objected to by plaintiff on the ground that it was incompetent, irrelevant and immaterial, and upon the further ground that defendant was estopped from introducing such mortgage in evidence,

and the objection taken under advisement and ruling reserved.

These objections were subsequently sustained by the Court, to which rulings of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 36).

EXCEPTION NO. 19.

Robert Wyllie Davis, the defendant, was called as a witness in his own behalf. He was asked the following question on direct examination:

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d day of January, 1906, recorded in liber 303 at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage.

To this question plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial, and the defendant was estopped from introducing any such papers in evidence. The ruling on this objection was reserved by the Court to be taken up with the objections to the deed and mortgage theretofore reserved, but subsequently, the objection [104] was sustained, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 7).

EXCEPTION NO. 20.

A. V. Gear was called as a witness by the plaintiff in rebuttal. He testified on direct that he was acquainted with the land of Mokapu, and first took it up in a business way in the latter part of 1909,—either September or October (Tr. II, pp. 24–25).

That he proceeded to actually occupy the premises at that time under an agreement with Mr. Davis, and so continued until about the middle part of 1911 (Tr. II, pp. 25-26).

Thereupon the witness was asked the following question on direct examination.

Q. Were you still working under the agreement with Wyllie Davis at the time you took this 25-year leasehold? (Tr. II, p. 27.)

This question was objected to by defendant on the ground that the same was incompetent, irrelevant and immaterial, but the objection was overruled by the Court. To this ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 27).

EXCEPTION NO. 21.

The witness answered the question as follows:

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

Thereupon defendant moved to strike out the answer, as it appeared that the witness was testifying in respect to two agreements, the contents of which were unknown.

This motion was denied by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 27). [105]

EXCEPTION NO. 22.

Further, the witness was asked on direct examina-

tion the following question:

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gear, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his interest to Sumner was discussed (Tr. II, p. 27)?

This question was objected to on the ground that there were not any agreements in evidence and the time laid was indefinite. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 27).

EXCEPTION NO. 23.

The witness, having stated that he was present at such a conversation, was asked the following question:

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

This question was objected to as irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues of this case and calling for a conclusion of the witness.

This objection however, was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 29).

EXCEPTION NO. 24.

The witness having testified that Mr. Sumner asked Mr. Davis and his wife to deed him the land

of Mokapu to which they objected and left, he was asked the further question:

Q. Just answer "Yes" or "No" to this question. Did you ever know from Wallie Davis' own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face? [106]

This question was objected to by defendant on the ground that the same was incompetent, irrelevant and immaterial and indefinite. The objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 29).

EXCEPTION NO. 25.

The witness having answered in the affirmative, he was asked the following question:

Q. Will you state what that statement was?

To this question defendant objected on the ground that the same was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case, but the objection was overruled, To this ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 30).

EXCEPTION NO. 26.

The witness having responded that Mr. Davis declared that the deed to John K. Sumner was given by way of security, the witness was asked the further question on direct (Tr. II, p. 31):

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he

spoke of giving Mokapu as security, did he mention anything about the amount of the advances which he had secured?

To this question defendant objected on the ground that the same was incompetent, irrelevant and immaterial. The objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 32).

EXCEPTION NO. 27.

Further, the witness was asked on direct examination (Tr. II, p. 32). [107]

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910.

This question was objected to by defendant on the ground that the same was incompetent, irrelevant and immaterial, but the objection was overruled by the Court. To this ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 32).

EXCEPTION NO. 28.

Both parties having rested, thereafter, on June 23, 1914, defendant asked for an amendment of the prayer in this complaint, the same to read as follows:

“Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted and that the plaintiff’s ownership therein may be confirmed and the plaintiff herein awarded his costs herein.”

To this motion defendant objected on the ground that the request came too late, which objection of the defendant was overruled by the Court, and an exception allowed the defendant and the motion to amend granted.

EXCEPTION NO. 29.

Thereafter, the Court orally found for the plaintiff for an undivided half of the term of years set out in the complaint, to which defendant excepted on the ground that the decision of the Court was against the law and the evidence and the weight of the evidence, and said exception was allowed.

[108]

EXCEPTION NO. 30.

Thereafter and on, to wit, the 25th day of June, 1914, the Court’s decision in writing in favor of plaintiff and against defendant was filed herein, to

which ruling of the Court defendant duly excepted on the ground that the same was contrary to law and the evidence and the weight of the evidence.

And thereafter and on to wit, the 26th day of June, 1914, judgment of the Court was entered and filed in favor of plaintiff and against defendant as prayed by the amended complaint, to which judgment defendant excepted on the ground that the same was contrary to law and the evidence and the weight of the evidence.

There is hereby made a part of the within bill of exceptions by reference, plaintiff's complaint, plaintiff's amended complaint, defendant's answer, judgment of nonsuit, remittitur of the Supreme Court upon review of judgment of nonsuit, plaintiff's and defendant's exhibits, including Plaintiff's Exhibits "A," "C," "D" and "E," and the records of the First Circuit Court in Equity No. 1293, Equity No. 1828 and Law No. 7695, and Defendant's Exhibit 2, 1 for identification and record in Equity No. 1814, order for transcript of evidence, transcript of the evidence, decision on merits, judgment, exception to judgment, all orders pertaining to the service and presentation of defendant's proposed bill of exceptions, including the orders of July 1 and August 24, respectively, and all clerk's minutes, records, papers, pleadings, documents, exhibits and files in the within cause; and defendant prays that upon settlement and allowance of the within exceptions, the same may be made a part hereof by reference.

Dated this 14th day of September, A. D. 1914.

E. C. PETERS,

Attorney for Defendant. [109]

[Order Settling, etc., Bill of Exceptions.]

The foregoing bill of exceptions being found conformable to the truth, is hereby allowed, and the prayer thereof is granted, and there is hereby made a part of the within bill of exceptions by reference, plaintiff's complaint, plaintiff's amended complaint, defendant's answer, judgment of nonsuit, remittitur of the Supreme Court upon review of judgment of nonsuit, plaintiff's and defendant's exhibits, including Plaintiff's Exhibits "A," "C," "D" and "E," and the records of the First Circuit Court in Equity No. 1293, Equity No. 1828 and Law No. 7695, and Defendant's Exhibit 2, 1 for identification and record in Equity No. 1814; order for transcript of evidence, transcript of the evidence, decision on merits, judgment, exception to judgment, all orders pertaining to the service and presentation of defendant's proposed bill of exceptions, including the orders of July 1 and August 24, respectively, and all clerk's minutes, records, papers, pleadings, documents, exhibits and files in the within cause.

November 6, 1914.

WM. L. WHITNEY,

Judge.

Service of the within Defendant's Bill of Excep-

tions is hereby admitted this 14th day of Sept. A. D. 1914.

THOMPSON, WILDER, MILVERTON &
LYMER,

W. B. L.,

Attorneys for Plaintiff.

[Endorsed]: L. No. 7783. Circuit Court, First Circuit Territory of Hawaii. Fred Harrison vs. Robert W. Davis. Defendant's Proposed Bill of Exceptions. Presented Sept. 14th, at 6:30 P. M. Wm. L. Whitney, Second Judge. Filed Nov. 6, 1914, at 11 A. M. J. Marcallino, Clerk. E. C. Peters, 210-211 McCandless Building Honolulu, T. H., Attorney for —.

No. 814. Received and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [110]

#381.

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

LAW NO. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Circuit Court, Jan. 13, 1914. First Jud. Circuit.

Transcript.

APPEARANCES.

For Plaintiff: Messrs. THOMPSON, WILDER,
WATSON & LYMER,

For Defendant: EMIL C. PETERS, Esq.

HERBERT R. JORDAN, Official Reporter.

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*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

LAW 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

TRANSCRIPT.

On Friday, the 17th day of October, 1913, at the
hour of 9:30 o'clock A. M., the above cause coming

on for trial before the Honorable William L. Whitney, Second Judge of the above-entitled Circuit Court, William B. Lymer, Esquire, of the firm of Messrs. Thompson, Wilder, Watson & Lymer, appearing for the plaintiff herein, and Emil C. Peters, Esquire, appearing for the defendant, the following proceedings were had and testimony taken:

(Demand for jury trial waived by both parties.)

(Counsel for plaintiff read complaint.)

[Testimony of George C. Kopa, for Plaintiff.]

GEORGE C. KOPA, a witness for the plaintiff, was duly sworn, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. You are identified with the record office of the Territory of Hawaii? A. Yes, sir. **[113]**

Q. And have been for a number of years last past?
A. Yes.

Mr. LYMER.—You will admit his qualifications to testify on the records, Mr. Peters?

Mr. PETERS.—Yes.

Q. Have you in your hand Liber 136 of the records of the registrar's office? A. Yes, sir.

Q. Will you turn to page 313 of Book 136 and state to the Court what instrument is there recorded?

A. (Witness examines book mentioned.) I find a trust deed given by John K. Sumner to Bruce Cartwright, dated August 16, 1892.

Mr. LYMER. May I suggest that I furnish the stenographer with a typewritten copy of this and

(Testimony of George C. Kopa.)

have it considered as though read in evidence.

Mr. PETERS.—No objection.

The following is the trust deed referred to, as recorded in Liber 136, pp. 136–7.

**[Trust Deed, August 16, 1892, John K. Sumner to
Bruce Cartwright.]**

**“JOHN K. SUMNER to BRUCE CARTWRIGHT.
TRUST DEED.**

“Stamped \$1.00.

“THIS INDENTURE, made this 16th day of August, A. D. 1892, between John K. Sumner of Tahiti, but at present residing in Honolulu in the Island of Oahu, the party of the first part, and Bruce Cartwright of said City of Honolulu, the party of the second part, WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant, bargain, and sell unto **[114]** the said party of the second part that certain piece or parcel of land situate, lying, and being in the District of Koolaupoko, Island of Oahu, and known as Mokapu, more particularly described as follows: Commencing at the hala tree on the sea coast marked on the plan the boundary runs along that of the land of Kaneohe North 54° 54', East 6990 six thousand, nine hundred and ninety feet; thence North 23° 45', West 1664 one thousand, six hundred and sixty-four feet to sea coast (thence round sea

coast) as shown on plan, to commencement, and containing an area of 434-6/10 acres, and being the same premises conveyed to William and John Sumner by deed of record in Liber 7 on pages 356 & 357. Together with all and singular the easements, tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainders or remainder, rents, issues, and profits thereof, and also all the estate, right, title and interest thereon or thereto. **TO HAVE AND TO HOLD** the same unto the said party of the second part and his heirs and assigns forever; but in trust, nevertheless, for the uses and purposes herein set forth, that is to say: In the first place, to pay the rents, issues, and profits arising therefrom or thereat so long as the lease now in existence is in force to me, the said party of the first part, and upon the expiration of the present lease or other sooner termination thereof to pay the rents, issues, and profits arising from or out of said land to my nephew, Robert Wyllie Davis, [115] during the term of his natural life, or in the discretion of said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes. And, in the second place, from and after the death of said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis, lawfully begotten, and, failing such heirs of his body, then to the wife, if living, of the said Robert W. Davis; and, failing such wife, then to convey the

said premises unto the heirs at law of the said Robert W. Davis, share and share alike.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year first above written.

“JOHN K. SUMNER.

“In the presence of

C. F. PETERSON.

“Hawaiian Islands,

Island of Oahu,—ss.

“On this 16th day of August, A. D. 1892, personally appeared before me John K. Sumner, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

“CHARLES F. PETERSON,

Notary Public.

“Recorded and compared this 17th day of August, A. D. 1892, at 2:11 o'clock P. M.

(Signed) MALCOLM BROWN,

Deputy Registrar of Conveyances.”

Mr. PETERS.—The Court will bear in mind that the rents, issues, and profits shall be paid to Davis, for life, or, in lieu thereof, to permit him at his discretion to reside upon said [116] premises and while so residing to use the same for agricultural and grazing purposes, and then, upon his death, if the Court please, to convey the said premises over to the lawfully begotten heirs of his body, and, fail-

(Testimony of George C. Kopa.)

ing which, to his wife, if any; failing which, to his heirs at law.

Mr. LYMER.—It is considered read in evidence?

Mr. PETERS.—It is considered read in evidence.

Mr. LYMER.—I have in my hand Equity No. 1293 to show the substitution of John B. Holt, Jr., as trustee, in place of Bruce Cartwright. Will you admit those are the official files of the Circuit Court of this Circuit?

Mr. PETERS.—I will admit that they are, but I don't admit their relevancy or competency. We object, if the Court please, and respectfully suggest that the objection be reserved to be taken up with the Court on the merits. We object to the introduction of the record on the ground that the Honorable George V. Gear, the Second Judge of the Circuit Court, was without jurisdiction to appoint a trustee or any substitute trustee, and that the order is wholly null and void, on the ground that at the time of the alleged order there had been vested in Robert Wyllie Davis, the beneficiary named in the trust deed a life estate absolute to the premises.

(File in Equity No. 1293 marked for identification, subject to a ruling of the Court on its admissibility later.)

Q. Mr. Kopa, turn to Book 343 of the records of the Hawaiian registrar's office and state what is there recorded, page 347. A. (No answer.)

Mr. LYMER.—By consent of counsel, in place of getting the most direct evidence, I should like to

(Testimony of George C. Kopa.)

file the document I have in my hand, counsel agreeing that it represents the [117] records contained in Liber 343 at pages 347-351 of the registrar's records, purporting to be a conveyance of lease from A. V. Holt, Trustee, to A. V. Gear of the land described in the Sumner trust deed, and following thereafter a consent by Robert Wyllie Davis to the lease, and following thereafter certain conveyances: first, by Gear to Charles F. Peterson; then from Peterson to Addie B. Gear; and thereafter an assignment by A. B. Gear to Fred Harrison, plaintiff in this action,—this document being a certified copy, and I offer it subject to objection of counsel.

(Objected to as incompetent, irrelevant, and immaterial, and not tending to prove any of the issues of the case, and on the further ground that said Holt named as trustee was not a trustee, but a pretended or fictitious trustee, and he had no authority in law to give such a lease.) (Ruling reserved, and paper marked for identification as exhibit "A.")

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. Mr. Kopa, will you produce, please, Libers 302, 336, 366,—

The COURT.—Is this cross-examination, Mr. Peters?

Mr. PETERS.—Of course, if counsel is going to object, that brings up promptly whether or not it is a proper cross-examination. I am inclined to be-

(Testimony of George C. Kopa.)

lieve that it is not cross-examination under the strict ruling.

The COURT.—I am also inclined to that opinion.

(Witness excused.)

Mr. LYMER. As the *record* now stand, assuming that the records are relevant and prove themselves, it shows that Holt [118] succeeded Cartwright as trustee, and then it shows a chain of assignments, finally vesting a half interest in Fred Harrison, but just how A. V. Gear, the first lessee, ceased to hold the entire lease has not been shown. I want counsel to assist me in that. Of course, if I prove that I show my client has the entire lease. I should like to put the entire record before the Court. Mr. A. V. Gear is a necessary witness at this point, if counsel cannot assist me. May I ask for a ruling of the Court on this point?

Mr. PETERS.—It seems to me if you prove that you are entitled to half the Court can only give you half.

Mr. LYMER.—The only way is to offer this assignment in evidence. Mr. Gear was to be here at nine o'clock and it is now about ten and I think the only way to do is to subpoena him.

[Testimony of Frederick Harrison, for Plaintiff.]

FREDERICK HARRISON, the plaintiff, was sworn as a witness in his own behalf, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Harrison, you are a resident of Honolulu,

(Testimony of Frederick Harrison.)

city and county of Honolulu, Territory of Hawaii, are you? A. Yes, sir.

Q. Do you know Robert Wyllie Davis, the defendant in this suit? A. Yes, sir.

Q. Is he also a resident of said Honolulu?

A. Yes, sir; at Kaneohe, on the other side of the island.

Q. On this island and in this territory. Have you any familiarity with certain land known as Mokapu? [119] A. Yes, sir.

Q. I hand you a paper marked "Exhibit 'A' for Identification" for plaintiff, showing the lease of certain land at Mokapu known as the land of Mokapu to A. V. Gear. (Handing exhibit for identification to the witness.) By referring to the reference here to the land known as Mokapu and the further reference that it is the land described in the Sumner trust deed, I will ask you whether or not that is an accurate description of the land with which you are familiar?

(Objected to, as no ground has been laid for this examination, and further that it is immaterial.)

(Question withdrawn.)

Mr. PETERS.—What is the purpose of this examination? I cannot appreciate the purpose. I don't see how Mr. Harrison's familiarity with the land is material.

Q. This document marked "Exhibit 'A' for Identification,"—the last assignment contained therein, immediately preceding the verification of the registrar, certification of the registrar, purports to be an

(Testimony of Frederick Harrison.)

assignment made November 15, 1910, from Addie B. Gear to Fred Harrison. I will ask you whether or not you are the Fred Harrison named in that assignment. A. Yes, sir.

Q. You are the assignee of that assignment?

A. Yes, sir.

Q. Did you pay a valuable consideration for that assignment? A. I did.

Q. Have you ever conveyed away that land, Mr. Harrison?

(Objected to as immaterial, except to the defendant to show that he has conveyed it away.) [120]

(Objection sustained.)

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. This particular assignment of lease from A. V. Gear to yourself was given by way of security, was it not? A. Yes.

Q. And was, in fact, a mortgage, was it not?

(Objected to as calling for a conclusion of law.)

(No ruling.)

A. I don't know as it was a mortgage. It was part of my security for endorsing certain notes.

Q. For endorsing certain notes from A. V. Gear to John K. Sumner? A. Yes.

Q. And, Mr. Harrison, you are the same Fred Harrison that is named in a certain equity action lately pending in the Circuit Court of the First Circuit, being No. 1814 of the Equity Division, and entitled Fred Harrison against A. V. Gear and Addie B. Gear, his wife?

(Testimony of Frederick Harrison.)

(Objected to as incompetent, irrelevant and immaterial.)

(Argument. Objection overruled.)

A. I am.

Mr. PETERS.—We offer the record in evidence.

(Objected to as incompetent, irrelevant and immaterial.)

(Objection overruled.)

(Record in Equity No. 1814 received in evidence.)

Q. Have you, Mr. Harrison, a certain agreement between yourself and Addie B. Gear, dated the 24th of October, 1910? [121] A. Yes, sir.

Q. Are you the Mr. Fred Harrison named in that particular agreement? A. I am, sir.

(Paper referred to offered in evidence.)

(Received and marked "Defendant's Exhibit 1.")

(Defendant's Exhibit 1 read to the Court.)

Q. Mr. Harrison, will you produce, please, the agreement dated the 16th of November, 1910, between yourself and A. V. Gear?

(Counsel for plaintiff produces document requested.)

Q. Counsel has produced, Mr. Harrison, what purports to be a mortgage, an agreement between yourself and Mr. A. V. Gear. (Handing document to the witness.)

A. (Witness examines the paper.)

Q. Are you the Mr. Harrison named in that particular document?

(Objected to as improper cross-examination.)

(Objection sustained.)

(Testimony of Frederick Harrison.)

Q. You are Fred Harrison, all right?

A. I think so; I wish I wasn't, though.

Mr. PETERS.—We will ask then that the document be marked for identification.

(Document marked “Defendant’s Exhibit 2” for identification.)

Q. You are the Fred Harrison named in this document or agreement of November 16, 1910, between yourself and A. V. Gear? (Handing document to the witness.)

A. Yes, sir. [122]

Q. I want to call your attention to another document connected with this Equity Case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison, and ask you whether or not you are the same Fred Harrison named in that particular document.

(Objected to as not proper cross-examination.)

(Objection sustained. Exception.)

Q. I will ask you if you are the same Fred Harrison named in a certain foreclosure deed, Fred Harrison, by Cecil Brown, on the 29th of February, 1912, and recorded in Liber 366, page 140.

(Objected to as not proper cross-examination.)

(Objection sustained. Exception.)

Redirect Examination.

(By WILLIAM B. LYMER, Esq.)

Q. You have identified on your cross-examination,—that is, my remembrance is that you identified a certain paper as having been executed by you and

(Testimony of Frederick Harrison.)

Mrs. Gear. If I am wrong you tell me. Did counsel hand you that paper? (Handing witness Defendant's Exhibit 1.)

A. Yes, sir.

Q. And you testified that you had signed it?

A. Yes, sir.

Q. Do you know whether or not Mrs. Abbie B. Gear signed the instrument? A. Yes, sir.

Q. Do you know, Mr. Harrison, whether or not the promissory notes, payment of which is mentioned in this exhibit as being a condition for reconveyance of your interest in Mokapu, were ever paid? [123]

(Objected to as incompetent, irrelevant and immaterial and not proper redirect examination.)

(Argument. Objection sustained.)

Q. You have stated in cross-examination that the original assignment of October 21, 1910, by Addie B. Gear of her half interest in Mokapu was merely a security assignment? A. Yes.

Q. Was there any security agreement in writing executed between yourself and Mrs. Gear, or was it purely an oral arrangement that this assignment was merely by means of security?

A. May I see that agreement you have? (Counsel hands document to the witness, and witness examines it.) This is the only agreement I had.

Q. This agreement you had in your hand marked "Defendant's Exhibit 1" you say was the only agreement you had? A. Yes.

Q. Does this agreement, Defendant's Exhibit 1, refer to the assignment of Addie B. Gear?

(Testimony of Frederick Harrison.)

(Objected to, as agreement itself is the best evidence.)

(Objection sustained.)

Q. Do you recall the circumstances surrounding the execution of this security agreement, Mr. Harrison?

(Objected to as immaterial. Argument.)

(Question withdrawn.)

Q. At the time when the assignment of October 24, 1910, from Addie B. Gear, to you, when she assigned the half interest in Mokapu to you, was there at that time any understanding between yourself and Mrs. Gear as to whether the assignment which you said was security was merely a security assignment [124] or an outright assignment?

(Objected to as immaterial, as we are not concerned with the circumstances; but concerned with the instrument as an instrument.)

(Argument. Objection sustained.)

Q. Have you anything further to say in regard to this security agreement between yourself and Mrs. Gear as to what it affected?

(Objected to, as agreement speaks for itself.)

(No ruling.)

A. I can state as far as my knowledge is concerned.

Q. You said some minutes ago, Mr. Harrison, or I asked you whether or not there had been given in writing some written agreement as to the assignment from Mrs. Gear to you being a security assignment, rather than an outright assignment?

(Testimony of Frederick Harrison.)

A. I didn't have a chance to finish my answer to your question. I intended to state not of that date, October 24th, but I knew of some agreements made since that date. This assignment with lease was made over in Mr. Rawlins' office, where we were negotiating in regard to these notes. This agreement was made on the 21st of October, 1910.

Q. Just make a statement as to the facts surrounding the security agreement.

A. Mrs. Gear came to me and asked if I would endorse her notes to Mr. Sumner, and I said I would take the matter up and see Mr. Rawlins, and Mrs. Gear agreed to assign the lease to me under the understanding that I would sign certain notes and under the agreement that we would give the property back if she paid up certain notes, and just an agreement in the meantime while this instrument was being drawn. [125]

Q. Is that agreement you hold in your hand this security agreement, the writing which was delivered in accordance with this understanding? (Referring to Defendant's Exhibit 1.)

A. Yes, sir.

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear.

(Objected to as immaterial and not proper re-direct examination.)

(Objection overruled.)

A. One of them was paid.

(Testimony of Frederick Harrison.)

Q. Was that note you referred to paid by Gear?

(Objected to as irrelevant, incompetent, and immaterial and not proper redirect examination.)

(Question withdrawn.)

Q. Which of these notes was paid?

A. Neither of them was paid.

(Objected to as incompetent, irrelevant, and immaterial and not proper redirect examination.)

(Objection sustained. Exception.)

Q. I have in my hand an assignment or paper dated June 6, 1913, purporting to be signed by Addie B. Gear and ask you at this time whether that is your signature on this? (Handing paper to the witness.)

(Objected to as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case.) [126]

(Argument. Objection overruled. Exception.)

Q. (Question read to the witness by the reporter.)

A. Yes, sir.

Recross-examination.

(By EMIL C. PETERS, Esq.)

Q. Don't you know the signature of Addie B. Gear?

A. I only know it by the way it is signed there. She never signed that in my presence.

Mr. PETERS.—We offer the instrument in evidence.

The COURT.—It cannot be received at this time as an exhibit for the defendant.

Mr. LYMER.—I offer the paper in evidence.

(Testimony of Frederick Harrison.)

(Objected to as incompetent, irrelevant, and immaterial.)

(Objection overruled.)

(Document received and marked "Plaintiff's Exhibit 'C.'")

[Testimony of William T. Rawlins, for Plaintiff.]

WILLIAM T. RAWLINS, a witness for the plaintiff, was duly sworn, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Rawlins, you have been the attorney of the plaintiff, Mr. Harrison, in this case at sundry times, have you not? A. I have.

Q. Were you acting as his attorney on or about the month of October, 1910? A. I was. [127]

Q. I show you first an assignment set out in Plaintiff's Exhibit "A" for identification, purporting to be from Abbie B. Gear to Fred Harrison, dated October 24, 1910, assigning certain interest in the land of Mokapu, and I also show you a paper marked "Defendant's Exhibit 1," and ask you what, if anything, can you say as to the drawing up of those separate instruments? What were the facts?

A. The facts relative to the drawing up of the instruments were these. Mr. Harrison came to me and stated that Mr. Gear had called on him with reference to he, Harrison, assiting Mr. Gear in meeting certain obligations with John Marcallino, as attorney or agent of John K. Sumner, which he had against Gear, as I understood it, of the result of an

(Testimony of William T. Rawlins.)

accounting. As I understood it, Gear had been substituted by John Marcallino and this matter came to a head in the Circuit Court before Judge Robinson, and Mr. Marcallino was pressing Mr. Gear and Mr. Gear had gone to Mr. Harrison to assist him. The matter was taken up and it was arranged that Mr. Gear should give his notes to John K. Sumner to be endorsed by Harrison. In consideration of the endorsement and assistance rendered by Harrison towards Mr. Gear he was to have Mrs. Gear assign her undivided half interest in the land of Mokapu, held under lease by John V. Holt and conveyed to Mrs. Gear by conveyances, until the notes of Mrs. Gear were paid. That was two or three or four days before the notes were signed, and the notes were signed at that time the arrangement was made. At that time I was Assistant United States District Attorney and my office was in this building. On October 24th, the notes were executed and delivered to Mr. Marcallino in that office, Mr. John K. Sumner present and Mr. Gear and myself. Immediately the question came up in view of the fact of Gear paying [128] the notes the question of whether Harrison would turn it back, and then this security agreement was drawn up on the 24th and then Mr. and Mrs. Gear went on the other side of the island and it was probably two weeks before we could get Mrs. Gear's signature to it, and on the 15th of November, I went up to her house and secured her signature to this instrument. It put in writing what the understanding was between Harrison and Gear as to what

(Testimony of William T. Rawlins.)

this assignment was. It wasn't an out-and-out assignment; all Harrison wanted was security for the payment of these notes. If Gear paid these notes when they became due, that was all Harrison wanted and Harrison would convey the property back, but, it will be noted here, that he should have part of the property even after Harrison had—

Q. Do I understand that the document was not signed on October 24th?

A. I say the document was dated October 24, 1910, was signed by Fred Harrison in my office and acknowledged by A. V. Gear and Mrs. Gear then went on the other side of the island and it took me several visits before I could get Mrs. Gear to sign the document, but finally it was signed by her and acknowledged at her residence. I called there several times and Mrs. Gear was out.

(Cross-examination waived.)

[Testimony of A. V. Gear, for Plaintiff.]

A. V. GEAR, a witness for the plaintiff, was duly sworn, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Gear, you are familiar with the transaction which took place between yourself and Mrs. Gear and Fred Harrison [129] during the month of October, 1910, relative to the endorsement by Mr. Fred Harrison of certain notes of yours about that time?

A. I am.

Q. Are you acquainted with the facts surrounding

(Testimony of A. V. Gear.)

the assignment by Mrs. Addie B. Gear of the assignment of her interest in the Mokapu lease to Mr. Fred Harrison? A. I am.

Q. And are you familiar with the facts surrounding the giving of the security agreement?

A. I am.

Q. Will you state the facts surrounding those transactions, particularly the assignment and security agreement.

A. The assignment of the lease was made by way of security to secure an endorsement by Fred Harrison of two notes which we might be compelled to meet, the understanding being that in case Mrs. Gear and myself being able to meet those notes the assignment would be reassigned back to Mrs. Gear. The transaction took two or three days, I think. Mr. Rawlins was very busy as United States District Attorney, and it was difficult to put it through at one sitting. The papers had to be drawn up and looked over and O K'd by myself and by Mrs. Gear, and also by Mr. Harrison. The lease was assigned to Mr. Harrison, and he signed a document whereby he agreed to reassign it in case the notes should be met; I think within one year's time; I don't recollect the exact date, but there was a certain length of time that was given to pay the notes and get the reassignment of the lease.

A. I hand you Defendant's Exhibit 1 and ask you whether or not that was the agreement as to which you have testified, the security agreement, or the re-

(Testimony of A. V. Gear.)

assignment agreement, rather. (Handing Exhibit 1 to the witness.)

A. (Witness examines the document.) That is the agreement, [130]

(Cross-examination waived.)

Mr. LYMER.—I desire to offer in evidence a deed by Cecil Brown, Trustee, dated June 9, 1913, to Fred Harrison of all right, title, and interest in and to the half interest of Addie B. Gear, being that conveyed by deed of Job Batchelor, dated ———. I will also ask the Court to admit the two documents offered in evidence for identification: First, the equity record No. 1293, record of the substitution of John D. Holt, Trustee, in favor of Bruce Cartwright, and then the lease.

The COURT.—That has already been offered and ruling reserved.

Mr. LYMER.—And then finally the deed from A. V. Gear, which was admitted in evidence a moment ago.

(Objected to as incompetent, irrelevant, and immaterial and not proving or tending to prove any point at issue.)

(Objection overruled. Exception.)

(Document referred to received in evidence and marked "Plaintiff's Exhibit 'D.'")

Mr. LYMER.—I should like counsel to admit that the John D. Holt, Jr., Trustee, appearing as lessor, is the one and same as John D. Holt mentioned in Equity 1814.

(Testimony of A. V. Gear.)

Mr. PETERS.—I will admit that.

(Adjourned to the hour of two o'clock P. M. Friday, October 17, 1913.) [131]

At the hour of two-twenty o'clock P. M. on Friday, October 17, 1913, all parties to the action being present in court, the following further proceedings were had and testimony taken:

A. V. GEAR, a witness for the plaintiff, was recalled, and testified as follows:

Direct Examination (Continued).

(By WILLIAM B. LYMER, Esq.)

Q. I hand you a paper which seems to have your signature affixed at the bottom. Is that your signature? (Handing document to the witness.)

A. (Witness examines the document.) It is.

Q. Below that is the signature of John D. Holt. Do you recognize that? A. I do.

Q. Can you state whether or not Mr. Holt signed the paper? A. He did sign the paper.

(Document referred to offered in evidence,—purporting to be an assignment by Mr. Gear at a time when he had all the Mokapu lease of a half interest in the lease to the defendant, Davis.)

(Objected to as incompetent, irrelevant, and immaterial and not proving or tending to prove anything at issue.)

(Objection overruled. Exception.)

(Document offered received and marked "Plaintiff's Exhibit 'E.' ")

(Plaintiff rests.) [132]

(Testimony of A. V. Gear.)

Mr. PETERS.—We move for a nonsuit on the grounds: (1) that the plaintiff has failed to show, nor is there any evidence tending to show, that the plaintiff is entitled to an undivided half for a term of years, until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint herein; (2) that the plaintiff has failed to show and there is no evidence, either competent or otherwise tending to show that he had any interest in the land known as Mokapu aforesaid; (3) that the alleged and pretended appointment of one John D. Holt or John D. Holt, Jr., by a Judge of the Circuit Court of the First Circuit was null and void in this: that the Circuit Court was without jurisdiction to make such appointment; and (4) that it affirmatively appears from the evidence that at the time of the execution of the alleged lease to the plaintiff the defendant was possessed of a life estate in the land so referred to as Mokapu, free and clear from any and all trusts.

I should like to argue the first point, if the Court please, as I consider that point decisive.

(Argument.)

The COURT.—I am not ready to decide the merits of the motion for nonsuit at this time.

By stipulation of counsel the following witness was recalled at this time for possible rebuttal:

[Testimony of William T. Rawlins, for Plaintiff
(Recalled in Rebuttal)].

WILLIAM T. RAWLINS, a witness for the plaintiff, was recalled for possible rebuttal, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.) [133]

Q. You know Robert Wyllie Davis, do you not?

A. I do.

Q. Did you ever have any conversation with Mr. Davis with regard to the land known as Mokapu, in controversy in this suit?

A. Yes; I have had a couple of *conversation* with him about it; one before there was ever any proceedings and one subsequent to the dispute.

Q. Was there anything said by Mr. Davis, the defendant in this action, to you at either of these conversations with reference to any rights that A. V. Gear, the early lessee of this lease, had in that land? Do you remember anything along that line?

A. That was in the first conversation with Mr. Davis; that took place in his house in Kaneohe.

Q. When was this? Can you place it as to time?

A. It was subsequent to the date of that instrument of October 24th. I don't know whether—Subsequent to 1910 and prior to the first of July, 1911, and the occasion of it was this. The Pacific Fish Company, Limited, wanted to secure a lease of the fishing rights at Mokapu and also other fishing rights in Kulau. I went over and saw a man named Darling who lived at Heia, and on the way back

(Testimony of William T. Rawlins.)

from Heia I dropped in on Mr. Davis and he got in about five o'clock, and we had a drink of gin—I was drinking in those days—and I spoke to Mr. Davis relative to these fishing rights. I was under the idea at that time that Mr. Davis controlled the fishing rights and that Gear had nothing to do with it, and he told me at that time, he told me about the transaction between himself and Gear; that Holt had made a lease to Gear and that Gear and he before that time had been in some business [134] in Mokapu and after that Gear gave him *him* a half interest in it, and the conversation went on regarding the anticipated law suit between himself and others—

Q. Just what was this that was said regarding fishing rights by Mr. Davis? Just what did he say?

A. He said he didn't know whether he could give me the fishing rights; also he said, "Gear has also a half interest in that place also." And I spoke to Mr. Davis about signing the lease and he said he didn't know whether he could sign a lease or not; that the whole of Mokapu had been leased by Gear and he didn't have the whole of the fishing rights.

Q. Was there anything in that conversation that had to do with either Mr. Gear's or Mr. Harrison's interest in this Mokapu lease?

A. That was three conversations.

Q. Give the time of the second conversation you had.

A. The second conversation was some time between the first of July, 1911, and the 15th day of Au-

(Testimony of William T. Rawlins.)

gust, 1911. I fix those two dates because on the first of July we moved our office up to the building on Fort Street, and my last date in that office was the 15th of August, when I was taken to the Queen's Hospital, and it was between those two dates when I went over to Mr. Harrison's office and Davis was there, and there was some talk there and Davis seemed to desire to arrive at some understanding and said they thought they could get together on the proposition, and he said there was one thing he didn't like,—the way Gear had treated him in Mokapu.

Q. Was there anything said by Mr. Davis as to ownership at that time?

(Objected to as immaterial.)

(No ruling.) [135]

A. Yes. He reiterated the statement that the lease had been made; that he had his interest and Gear had his interest; and he went on to say that he had been advised by his attorney, Mr. Peters, that he could win out in the long run; that he was very sorry Mr. Harrison put his money in that, but he could win.

Q. Was there anything in the third or fourth conversation?

A. Yes. The third conversation took place in Kaneohe. It was the time when my father was in Kau and he was detained on the long ———. I can fix the date if I saw the record of the Court. We went over there, and after the case was disposed of Mr. Davis and Fred Harrison and myself sat down

(Testimony of William T. Rawlins.)

and we talked this matter over and again Davis mentioned the fact of this lease and he seemed to be in a better mood. He said, "Now, Fred, I think we can fix this thing up, but my attorney, I owe him some money and I can't get out of it until I pay him that money."

Q. Was there anything bearing on it as to the chances of ownership?

A. As I stated, the question was all gone over again as to his interest under that lease, and I told Davis at the time, "I'm not interested in that matter any more. I am over here on something else," but we talked it all over there— And by that time your firm had got into the matter, but we talked this all over and I told him I had seen a copy of this instrument that Gear had given him a half interest in it, and he seemed to be willing to call it all off and take a part interest in it, but the whole thing seemed to be that he owed Peters some money and he didn't think he would be able to settle it. [136]

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. When did this conversation occur?

A. Some time prior to the first of July.

Q. July, 1911?

A. July, 1911. I had my office in this building at that time. We went over to Kulau with two machines with the Japanese.

Q. At that time wasn't the argument advanced by Mr. Davis or counsel representing him that this

(Testimony of William T. Rawlins.)

lease from Holt to Gear was simply a subterfuge?

A. No. I'll tell you the rest of this conversation. We had a drink of gin and we got to talking and we talked about this trust deed, and Wallie told me about the transactions he had with John K. Sumner. He deeded him a half of his interest and Wallie had to pay money back at a certain time. And we talked it all over and he wanted my opinion in regard to this trust deed, and I told him, "You had better consult your lawyer."

Q. Mr. Davis at that time advised you that previously he had conveyed one-half of the premises to John K. Sumner and that he could repurchase that on the payment of a sum of money?

A. He told me his attorney said it was like a mortgage; that a certain amount of money had to be paid back within a certain time.

Q. And he also told you in addition to this conveyance that there was actually a note and mortgage existing on Mokapu, all of which was anterior to this lease, did he not?

A. Subsequent to the whole Gear lease. The Gear lease was [137] in 1910 and the whole of this was after.

Q. No. You don't understand me. The other instrument, which was actually a mortgage which had been made by him, Davis, to John K. Sumner, was prior to this Holt-Gear lease?

A. That was the first I knew of it; and he also informed me at that time—and from the statement he made I subsequently won a case when they tried

(Testimony of William T. Rawlins.)

to foreclose that mortgage—he told me, Wallie Davis told me you had advised him and they would get Harrison, as he put it, “by the balls”; that’s the language he used.

Q. Who used that language? A. Wallie.

Q. In any event, upon this first conversation, Mr. Rawlins, Davis intimated to you that he believed that under this trust deed he was the person who could sell and dispose of Mokapu, did he not?

A. No; I wouldn’t say he intimated that, because in talking to him one of the things that was asked of me by Wallie was if I thought this mortgage was on the land or of his interest in it, and I said, “I’m not your attorney. Go to you attorney.” But he seemed to think that was the big question in it.

Q. That was the big question in it, as to whether he had conveyed the land or a sort of expectancy?

A. The rent and income of the property, as I understood it.

(Adjourned *sine die*.) [138]

At the hour of two o’clock P. M., on Monday, November 17, 1913, all parties to the action being present in court, the following further proceedings were had:

Mr. Lymer presented a motion to allow further evidence to be introduced.

(Objected to.)

(Motion granted.)

Mr. Peters noted an exception, and moves the Court to reconsider the motion and deny the same on the ground that no specific evidence is offered.

(Testimony of William T. Rawlins.)

The Court vacated and set aside its order herein, and ordered that the motion to reopen be granted, and counsel be permitted to put in evidence in that certain case Equity No. 1828, and supplement the same by the testimony of the plaintiff, showing or tending to show that the condition existing at the time of filing the answer existed at the time of bringing this case.

(Adjourned to Wednesday, November 19, 1913, at the hour of two o'clock P. M.)

At the hour of two o'clock P. M. on Wednesday, November 19, 1913, all parties to the action being present in court, the following further proceedings were had and testimony taken:

Mr. LYMER.—At this time I desire to offer in evidence the files in Case No. 1828, Equity Division of the Circuit Court of the First Judicial Circuit of this Territory.

(Objected to as incompetent, irrelevant, and [139] immaterial, not tending to prove or disprove any of the issues in the case.)

(Objection overruled. Exception.)

Files offered in evidence received in evidence as plaintiff's exhibit.)

[Testimony of Frederick Harrison, in His Own Behalf (Recalled).]

FREDERICK HARRISON, the plaintiff, recalled as a witness in his own behalf, testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. There has been heretofore offered in evidence

(Testimony of Frederick Harrison.)

in this suit the files in No. 1814, Equity Division of this court, a suit to foreclose a mortgage brought by Fred Harrison, plaintiff, against A. V. Gear and Addie B. Gear, his wife, defendants. Were you the plaintiff in that action to foreclose mortgage?

A. I am.

Q. And the files show here that—I want to ask you first, was there anything you were seeking to foreclose in that mortgage foreclosure suit that has anything to do with the present suit?

(Objected to, as the files in evidence are the best evidence.)

(Argument. Question withdrawn.)

Q. I will ask you this. In this foreclosure proceeding when the time came for a sale to be made, a commissioner's sale under order of the Court, who bought in whatever interests were foreclosed in this proceeding?

(Objected to as incompetent, irrelevant, and immaterial.) [140]

(Argument. Objection overruled. Exception.)

A. Cecil Brown.

Q. Whose money was used in this purchase, Mr. Brown's money or someone else's?

(Objected to as immaterial.)

(No ruling.)

A. It was my money. I went right down to the bank and made a check out and paid it over to Cecil Brown.

Q. So that Cecil Brown took it over as trustee for you?

(Testimony of Frederick Harrison.)

(Objected to as incompetent, irrelevant, and immaterial.)

(Question withdrawn.)

Q. And Mr. Brown became purchaser for you with your money of whatever was foreclosed?

A. That is right.

Q. After these foreclosure proceedings, when Mr. Brown took title, as you testified, was anything done by you or Mr. Brown to determine your rights in Mokapu?

A. Yes. I instructed Mr. Brown to bring a suit of partition, which I think was brought before Judge Whitney, and I think Judge Whitney decided against us in that case, and I think we appealed from his decision to the Supreme Court.

Q. I hand you File 1828, Equity Division, partition suit, and will ask you if that is the suit brought by Mr. Brown by your procuration? A. Yes, sir.

Q. Who paid the costs? A. I did.

Q. Who retained the attorneys?

A. I did. [141]

Q. Did Mr. Brown have anything to do with it?

A. No; I engaged Mr. Thompson, your firm.

Q. You struck a snag in this suit, I understood you to say. What happened when this suit was on trial before Judge Whitney?

(Objected to as immaterial and the record is the best evidence.)

(Question withdrawn.)

Q. Has that suit ever been terminated?

(Testimony of Frederick Harrison.)

(Objected to, as record is the best evidence.)

(Question withdrawn.)

Q. This record, Mr. Harrison, shows that on August 14, 1912, his Honor, Judge Whitney, filed a decision holding that the question of title involved in these partition proceedings and the parties would have to go to law to quiet that title before they could conclude the partition suit; that the partition suit would have to be withheld and not proceeded with further until the case was determined. What, if anything, did you do after the opinion of the Supreme Court upholding Judge Whitney's ruling came down?

(Objected to as immaterial.)

(Argument. Objection overruled. Exception.)

A. In regard to the partition suit?

Q. Yes. When this opinion of the Supreme Court came down upholding Judge Whitney and stating that the parties had to go to law to quiet title before they could conclude the partition suit? What did you do?

A. I instructed my lawyers to go ahead and enter a new suit to quiet title.

Q. In whose name? [142]

A. In the name of Cecil Brown, trustee.

Q. And the records show—

A. I think he brought that case and my attorneys took a nonsuit.

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert

(Testimony of Frederick Harrison.)

Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title?

(Objected to as immaterial.)

(Objection overruled. Exception.)

A. Yes, sir.

Mr. LYMER.—May I put this in evidence, your Honor? I offer it in evidence. (Referring to Law No. 7695.)

(Objected to as immaterial.)

(Objection overruled. Exception.)

(Law No. 7695 received in evidence as plaintiff's exhibit.)

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When that nonsuit was granted what, if anything, further did you do?

(Objected to as immaterial.)

(Objection overruled. Exception.)

A. I went to my lawyers and they advised me to write to Cecil Brown to assign over all his interests he had, and also to get a quitclaim deed from Addie B. Gear, and after that I entered suit in my own name to quiet title.

Q. And that is the present suit?

A. That is the present suit that is now pending, and I have also been firing at this thing ever since, paying all the costs [143] and such things.

Q. What pertinent and germane remarks have

(Testimony of Frederick Harrison.)

you to make about this partition suit and the two suits to quiet title? Have you anything to say about it?

(Objected to as immaterial.)

(Objection sustained.)

Q. I want to limit this question. I am going to ask you about a time subsequent to the filing of this present suit, I think that is in June, 1913. At or about the time when this present suit was instituted, Mr. Harrison, were you present on any occasion when any statement was made either by Mr. Davis or his attorney, Mr. Peters, as to any claim that Wyllie Davis was urging in this land of Mokapu, directing your attention to the time about when this last suit was filed?

A. At one time, I don't know exactly what time it was, I happened to be in Mr. Rawlins' office—

(Objected to as indefinite.)

Q. Place it just as nearly as you can, approximately.

A. I should judge it is from three to four months ago.

Q. Was it before or after the filing of this present suit? A. In June?

Q. Yes.

A. It was before.

Q. How long before?

A. I should judge about somewhere around about that time; just close to it.

Q. Can you state to the Court whether or not it

(Testimony of Frederick Harrison.)

could have been more than two weeks prior to the time when this last suit was filed?

A. I couldn't state the time. I know the conversation took place and I was in the office and Mr. Rawlins was there [144] at the time.

Q. What is your best recollection of the time?

A. I should judge it was between four and five months ago.

Q. Five months would be last June. In this conversation which you say took place in your presence about five months ago who was present?

A. Mr. Rawlins, myself—

Q. Who else?

A. I don't know. Several Koreans I think in the office at the time. I don't remember.

Q. Were the only persons present yourself and Mr. Rawlins and some Koreans? A. Yes.

Q. Who made the statement? A. Mr. Peters.

Q. He was present? A. Yes.

Q. What was said in regard to Mokapu at that time, if anything, and with regard to Mr. Davis' claim?

A. I think Mr. Peters came in and asked for some pleadings in regard to the foreclosure suit of Mr. Rawlins. Mr. Rawlins looked for these pleadings, I believe, and couldn't find them, and Mr. Peters said he could get them up in the Circuit Court, and so we were talking over Mokapu affairs and Mr. Peters said to me, "Why don't you buy Mokapu?" And I said, "What do you want for it?" He said, "I think

(Testimony of Frederick Harrison.)

"I can get it for *you* thirteen or fourteen thousand dollars." And I asked him if he thought he could get me a free title, and he said, "I think I can," and Mr. Rawlins said, "What are you going to do with these other titles?" And Mr. Peters said, "I think I could go [145] to court and get a naked trust." And I told him if he could get a clear title to Mokapu for that amount of twelve or thirteen thousand dollars I would take it over.

Q. What was said by Mr. Peters?

A. He told me he could go to court and get a naked trust and get a clear title to Mokapu.

Q. For whom? A. For us; for me.

Q. Was anything said about Wallie Davis at this time?

(Objected to as leading and suggestive.)

(Objection sustained.)

Q. He said he could go to court and get a naked trust?

A. I didn't know what a naked trust was.

Q. And that would constitute a clear title which he could sell to you for thirteen thousand dollars?

(Objected to as leading and suggestive.)

(Objection sustained.)

Mr. PETERS.—I move to strike it all out, as it seems to be in the way of a compromise, in the way of conflicting interests. I mean a compromise of that character is privileged. I mean the whole conversation. I move to strike out all this so-called offer of a compromise of conflicting interests as tes-

(Testimony of Frederick Harrison.)

tified to by Mr. Harrison on the ground that it was in the nature of a compromise and privileged.

Mr. LYMER.—I don't mind this going out, but I do want left in the record the statement made by Mr. Davis' representative, Mr. Peters, that he could go into court and get a naked trust declared. I want to tie this up to show that at just about the time this last suit was brought the attorney for Mr. Davis appeared and said, "I can go to court and get a [146] naked trust declared and sell for thirteen thousand dollars."

The COURT.—I certainly think there is no question that all that pertains to a compromise should go out. The entire conversation concerning the settling of the controversy will be stricken.

Mr. LYMER.—This entire answer touching the conversation held between Mr. Peters and Mr. Rawlins and the witness goes out?

The COURT.—On the ground that it was a conversation pertaining to a compromise.

(Exception.)

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. This so-called conversation—

(Objected to as not proper cross-examination.)

(Argument. Objection sustained.)

Mr. LYMER.—That is all, your Honor. It is not necessary for me to rest again, as I have already rested except for this limited hearing.

The COURT.—Counsel will be notified when the

decision on the motion for nonsuit is ready.

(Adjourned *sine die*.) [147]

I CERTIFY that the foregoing is a true and correct transcript of my stenographic notes taken on the trial of the above-entitled cause.

HERBERT R. JORDAN,
Official Reporter.

Honolulu, T. H., January 2, 1914.

[Endorsed]: Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robt. Wyllie Davis. Transcript of Evidence. Circuit Court, Jan. 13, 1914. First Jud. Circuit. Filed Jan. 13, 1914. A. K. Aona, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Received and filed in the Supreme Court November 28, 1914, at 9.45 A. M. Robert Parker, Jr., Assistant Clerk. [148]

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*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

Law No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Transcript.

APPEARANCES:

For Plaintiff: Messrs. THOMPSON, WILDER,
MILVERTON & LYMER.

For Defendant: EMIL C. PETERS, Esq.

HERBERT R. JORDAN,

Official Reporter. [149]

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[150]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

LAW No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Transcript.

The above-entitled cause having been remitted to this court by the Supreme Court for further trial by remittitur dated March 7, 1914, came duly on for hearing at the hour of three o'clock P. M., on Monday, April 13, 1914, before the Honorable William

L. Whitney, Second Judge of the above-entitled Circuit Court, William B. Lymer, Esq., of the firm of Messrs. Thompson, Wilder, Milverton & Lymer, appearing for the plaintiff herein, and Emil C. Peters, Esq., appearing for the defendant, and the following proceedings were had and testimony taken:

[Testimony of George K. Kopa, for Defendant.]

GEORGE K. KOPA, resumed the stand as a witness for the defendant, and testified as follows:

Direct Examination.

(By EMIL C. PETERS, Esq.)

Q. Will you produce, Mr. Kopa, please, Liber 302, and turn [151] to page 192 and see what you have.

A. (Witness refers to book and page mentioned.) I find a deed made by Robert Wyllie Davis and wife to John K. Sumner.

Q. Read it, please.

(Objected to as incompetent, irrelevant, and immaterial; defendant estopped from introducing any such deed in evidence.)

(Argument.)

(Ruling reserved and answer allowed in subject to being stricken upon announcement of Court's ruling on objection.)

A. (Witness reads from Book 302, page 192 *et seq.*)

“KNOW ALL MEN BY THESE PRESENTS: That I, Robert W. Davis, of Honolulu, County of Oahu, Territory of Hawaii, for and in consideration of Two Thousand, Seven Hundred and Ninety-four

(Testimony of George K. Kopa.)

and 93/100 (\$2,794.93) to me paid by John K. Sumner of said Honolulu, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said John K. Sumner all my one-half ($\frac{1}{2}$) undivided share and interest in and to that certain piece or parcel of land situated at Koolaupoko, Island of Oahu, aforesaid, known as the land of Mokapu and [152] more particularly described as follows”:

Mr. PETERS.—You may omit the description if it will be admitted that it is the same as in the trust deed.

Mr. LYMER.—I consent to that.

A. (Witness resumes reading:) “To Have and To Hold the same with all rights, privileges, and appurtenances thereto belonging or appertaining to the said John K. Sumner and his heirs and assigns forever and to their own use and behoof forever.

“And I hereby for myself and my heirs, executors, and administrators covenant with the grantee and his heirs and assigns that I am lawfully seized in fee simple of the premises; that I have good right to sell and convey the same, as aforesaid; that the same are free and clear of all encumbrances; and that I will and my heirs, executors, and administrators shall warrant and defend the same to the grantee and his heirs and assigns against the lawful claims and demands of all persons whatsoever.

“And I, Mary Kealohanui Davis, wife of the said Robert W. Davis, for the consideration aforesaid,

(Testimony of George K. Kopa.)

release to the grantee and his heirs and assigns all right of and to dower in the granted premises.

“In Witness Whereof we, the said Robert W. Davis and the said Mary Kealohanui Davis, his wife, hereto set our hands and seals this first day of January, 1906.

“(Signed) ROBERT W. DAVIS.

“(Signed) MARY KEALOHANUI DAVIS.”

Acknowledged before Alfred T. Brock, Notary Public, First Judicial Circuit, on the 6th day of February, 1906, and recorded March 4, 1908, at 12:52 o'clock P. M. [153]

Q. Turn to Liber 303, page 91, and tell us what you have there.

(Objected to as incompetent, irrelevant, and immaterial; defendant estopped from introducing document in evidence—Ruling reserved and answer allowed in subject to being stricken when Court announces ruling on objection.)

A. (Witness reads from Book 303, pp. 91 *et seq.*)
“Know All Men by These Presents: That I, Robert W. Davis of Honolulu, County of Oahu, Territory of Hawaii, for and in consideration of Two Thousand, Five Hundred (2,500) Dollars, to me paid by John K. Sumner of said Honolulu, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said John K. Sumner all my undivided one-half share and interest in and to that certain piece or parcel of land situated at Kooaupoku, Island of Oahu, aforesaid, known as the land of Mokapu and more particularly described as follows:

(Testimony of George K. Kopa.)

(Description omitted by agreement of counsel that it is the same as contained in the Sumner trust deed.)

“To Have and To Hold the same with all rights, privileges, and appurtenances thereto belonging or appertaining to the said John K. Sumner and his heirs and assigns to their own use and behoof forever.

“And I hereby for myself and my heirs, executors, and administrators covenant with the grantee and his heirs and assigns that I am lawfully seized in fee simple of the granted premises; that I have good right to sell and convey the same, as aforesaid; that the same are free and clear of all [154] encumbrances; and that I will and my heirs, executors, and administrators shall warrant and defend the same against the lawful claims and demands of all persons whatsoever.

“And I, Mary Kealohanui Davis, wife of the said Robert W. Davis, for the consideration aforesaid, hereby release to the grantee and his heirs and assigns all right of and to dower in the granted premises.

“Provided, nevertheless, that if I or my heirs, executors, administrators, or assigns shall pay unto the said John K. Sumner or his heirs or assigns the sum of \$2,500 in five years from this date, with interest semi-annually, at the rate of seven per cent per annum, and shall not commit or suffer any waste of the granted premises or any breach of any covenant herein, then this deed and note signed by me whereby I promise to pay to the said John K. Sumner the said

(Testimony of George K. Kopa.)

sum and the interest aforesaid shall be void.

“But upon any default in the observance or performance of the foregoing covenants the grantee, his heirs, executors, administrators or assigns may sell the granted premises, or such portions thereof as remain subject to this mortgage and may sell and convey the same with all rights and privileges thereto belonging at public auction in said Honolulu in accordance with the provisions of Chapter 139 of the Revised Laws of Hawaii and amendments thereto, entitled, ‘Foreclosure of Mortgage,’ without making any demand or any entry, and may convey the premises so sold by proper deed to the purchaser or purchasers thereof absolutely in fee simple in his own name or as my attorney in fact hereby irrevocably constituted, and such sale shall forever bar me and all persons claiming under me from all interest, whether at law or in equity, in [155] the granted premises. And out of the moneys arising from such sale or sales the grantee or his representatives shall be entitled to retain all sums secured by this deed, whether then or thereafter payable, including all costs, charges, expenses and reasonable attorney’s fee incurred or sustained by them by reason of any default in the performance or observance of said condition running, if any, to me or my heirs and assigns.

“And I hereby for myself and my heirs and assigns covenant with the grantee and his heirs, executors, administrators, and assigns that in case a sale shall be made under the foregoing power, I or they will upon request execute, acknowledge, and deliver to the

(Testimony of George K. Kopa.)

purchaser or purchasers thereof a deed or deeds of release confirming such sale.

“And it is agreed that the grantee and his heirs and assigns or any person or persons in his or their behalf may purchase at any sale made as aforesaid. And that no other purchaser shall be answerable for the application of the purchase money.

“In Witness Whereof we, the said Robert W. Davis and Mary Kealohanui Davis, herunto set our hands and seals this second day of January, 1906.

“(Signed) ROBERT W. DAVIS.

“(Signed) MARY KEALOHANUI DAVIS.”

Acknowledged before Alfred T. Brock, Notary Public, First Judicial Circuit, the 6th day of January, 1906. Recorded on the 4th day of March, 1908, at 12:35 o'clock P. M. [156]

[Testimony of Robert Wyllie Davis, for Defendant.]

ROBERT WYLLIE DAVIS, the defendant, was duly sworn as a witness in his own behalf, and testified as follows:

Direct Examination.

(By E. C. PETERS, Esq.)

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d of January, 1906, recorded in Liber 303 at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage?

Mr. LYMER.—I object to giving any evidence about a conveyance from Robert Wyllie Davis to John K. Sumner or to anybody else as incompetent, irrelevant, and material, and the defendant is es-

(Testimony of Robert Wyllie Davis.)

topped from introducing any such papers in evidence.

(By consent of counsel the objections heretofore interposed to the introduction of documents applies to all questions concerning them.)

(Ruling on objection reserved.)

A. No; never been paid.

Q. Do you recollect the time you made the assignment. Mrs. Davis' joining therein by way of release of dower to Sumner dated the first of January, 1906, and recorded in Liber 302, Page 92? A. Yes.

Q. After that deed and mortgage was made what, if anything, did Mr. Sumner do with respect to Mokapu?

A. He went there and lived. Moved over there and took charge of the place.

Q. What use, if any, did he make of the premises?

A. He used it for agricultural purposes, such as planting, and [157] he bought some hogs.

Q. You went into partnership with him in the hog business?

A. Yes.—And also some cows; bought some cows and turned them into the pasture.

Q. State how long Mr. Sumner has been in possession over there?

A. He was over these for over a year. Stayed over there for a year and then he left me in charge and moved back to town.

Q. State whether or not after that he visited the premises. A. Oh, yes.

(Testimony of Robert Wyllie Davis.)

Q. When was the last time he has been on the premises?

A. He made trips over there occasionally all the time. He had a little buggy and horse. Sometimes he would come with Al Brock and sometimes with Mr. Mott-Smith.

Q. Mr. Brock and Mr. Mott-Smith were representing him under trustees and powers of attorneys as agents? A. Yes.

Q. How long did that continue?

A. That continued, as far as I can recollect, up to the time—It was a little after the time Mott-Smith was appointed secretary, and Brock went to the coast; and it was way after that, it was later on after that and just before Ulysses Jones took charge of his business.

Q. When was that?

A. When Jones took charge?

Q. Yes.

A. As near as I can recollect—I couldn't give you the exact date. It was just about when A. V. Gere came in; that was before Jones, and it was during that time when A. V. Gere had it. He made one trip and he didn't come over after that until Jones got it. That's as near as I can give you the time. [158]

Q. Have you ever seen the deed of assignment from John K. Sumner to Jones?

A. The deed of assignment?

Q. The deed of assignment from John K. Sumner to Jones, or a copy of it. The reason that I ask is that the date is the 15th of July, 1911, and I ask you

(Testimony of Robert Wyllie Davis.)

if from that you can fix the time as to when Jones became the agent of Mr. Sumner?

A. No, I don't remember seeing that.

Mr. LYMER.—I will admit that is the date of the deed.

Q. After Jones took possession of it or became Mr. Sumner's agent state whether or not Mr. Sumner ever visited over there?

A. Yes; he took the trip over there with Jones and his wife, and Mr. Sumner himself came over—

Q. And lately has he been over there?

A. He has been over there now with me something like four months. He just came up together with me today.

Q. During that time, Mr. Davis, you also have been in possession over there?

A. I have always lived there. It is my home.

Q. And have been using the premises for any use at all? A. Ever since that time.

Q. What use have you made of the premises?

A. I used it for planting melons and cotton. It was through this melon planting when A. V. Gere came in he brought down a little bag of Caravonica cotton seed and told me to experiment with it, and—

Q. Never mind about that. A. (No answer.)

Mr. PETERS.—That's all. [159]

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Cross-examination.

(By WILLIAM B. LYMER, Esq.)

Q. You never have paid that mortgage?

(Testimony of Robert Wyllie Davis.)

A. No.

Q. Still owe it in full? A. Yes.

Q. That mortgage was given on January 2, 1906, and the deed referred to by Mr. Peters, your counsel, was January 1, 1906? As a matter of fact, wasn't this deed given January 1, 1906, and signed by you and your wife and John K. Sumner really a mortgage, just a deed given to secure moneys advanced to you by Mr. Sumner? Is not that a fact? It wasn't simply a deed, but a mortgage?

(Objected to as incompetent, irrelevant and immaterial.)

(Argument. Question withdrawn.)

Q. This mortgage of *your* was given the first part of January, 1906,—you remember that?

A. It may have been. I haven't seen it for a long time.

Q. And about the time it was given Mr. Sumner went over and went into possession of Makapu?

A. About that time. The first or second. There was two; there was a mortgage and the deed.

Q. But they were given within twenty-four hours of each other. About how long after they were given did Sumner go over and take possession?

A. Sumner went there—he was there right along, or at Moku Manu, this little island in the Bay of Heeia and he used to come across in the boat to Makapu.

Q. How long before this deed was given did Mr. Sumner come over, three or four or five years prior to that time?

A. To my knowledge Sumner always called there

(Testimony of Robert Wyllie Davis.)

even before we [160] made the deed; even when it was leased to the Kaneohe Ranch it was a habit of his to go and look at Mokapu and he was going there off and on.

Q. And after you gave this mortgage to him in January, 1906, he just kept right on coming as he had before?

A. No; after these papers were drawn up then he stayed there a good deal of the time.

Q. About how much of the time?

A. Well, Mr. Sumner is a great church member and he would come sometimes of a Monday morning and stay until Saturday afternoon and come to town and stay one or two days and come over there, and he began to hire laborers. He hired some Japanese and some native women over there and started them planting potatoes and vegetables and all kinds of stuff.

Q. And how long was it he stayed over there and took charge of things?

A. Over a year,—that is, staid right there and came to town and he took sick and he was very sick and then he was under the doctor's care, Macdonald; he advised him not to go over there.

Q. After about a year or something over a year down there he came to town here and was sick and was under Dr. Macdonald's care, and the doctor told him not to go there so much?

A. For a while, yes.

Q. Did he go over and live again? A. Oh, yes.

Q. How long did he stay the second time?

(Testimony of Robert Wyllie Davis.)

A. The same as usual,—stay over a week and come over here for a day or two days and come back.

Q. Was he living there or where at the time A. V. Gere took that deed from A. V. Holt, Trustee? I am talking about the beginning of Gere's time. Was Sumner living on that land of [161] Mokapu down there at the time Gere took his 25-year lease?

A. He was down and back to town. He wouldn't be there all the time. I remember his coming to Mokapu and telling me he had a new trustee.

Q. You were living at Mokapu all these years?

A. Oh, yes.

Q. Do you know when the Gere lease for 25 years was given to Gere? A. Lease to Gere?

Q. Do you remember the lease to Gere? Do you recall the lease? A. I don't know.

Q. You don't know whether or not A. V. Gere took the lease to Makapu?

A. He spoke to me about getting a lease made.

Q. But you didn't know he got one made?

A. As near as I can remember, I think he showed me a lease.

Q. As near as you can remember, didn't you sign it by way of consent? Don't you remember, as a matter of fact, signing this lease in June, 1910?

A. Well, Gere had so many documents presented to me that I got all mixed up. It was one time for planting and for hog ranching and for partnership and at one time he deeded a piece of property that belonged to Sumner,—and he had so many documents that I don't know.

(Testimony of Robert Wyllie Davis.)

Q. When did Gere first go down there to Mokapu?

A. It may have been three or four years ago. I'm not quite positive.

Q. Did he go down there and live and make Mokapu his home?

A. As I stated, he brought me some seed—

(Question objected to as improper cross-examination.)

(No ruling.) [162]

Q. I am trying to find out whether Mr. Sumner was living there at that time. Did Gere live down there, or did he just come down there? Did he just come down once in a while or make his home there?

A. Later on he started in to gin cotton and then he moved over to a little cotton house where the cotton was.

Q. When he first came in was Sumner living there?

A. No; Sumner used to come and visit us and go back.

Q. Wasn't Mr. Gere living on Mokapu in the house with you when he first came down there? Didn't he go in *an* live and occupy a house along with you?

A. He didn't occupy any house at all. I gave him a bed to sleep in.

Q. And part of the time he wasn't there at all?

A. Yes; part of the time he wasn't there at all.

Q. About how often was Sumner making visits to Mokapu at the time Gere came into that Mokapu business down there?

A. When I saw my uncle that he was giving up coming down to Mokapu it was the time he brought

(Testimony of Robert Wyllie Davis.)

suit. He got sore because Gere spent all his money and that was the time he employed Watson and Thayer in that case and that was the time I found out he wouldn't come down there and wouldn't speak to Gere and wouldn't have anything to do with him.

(Adjourned to 9:00 o'clock A. M., Thursday, April 16, 1914.) [163]

On Thursday, April 16, 1914, at the hour of 9:20 o'clock A. M., all parties to the action being present in court, the following further proceedings were had and testimony taken:

ROBERT WYLLIE DAVIS resumed the stand as a witness in his own behalf, and testified as follows:

Cross-examination (Continued).

(By WILLIAM B. LYMER, Esq.)

Q. I understood you yesterday to say that about the time this so-called deed was given—

Mr. LYMER.—The Supreme Court sent back the order that your Honor overrule the motion for nonsuit. I suppose that is acquiesced in by everybody.

The COURT.—Obeying the mandate of the Supreme Court, the Court will deny motion for nonsuit heretofore made.

Mr. PETERS.—To which ruling of the Court the defendant here and now excepts.

The COURT.—The exception will be noted.

Q. Now, Mr. Davis, I understood you yesterday in your testimony that you said about the time these two instruments were given by you to Sumner, one of them a mortgage on its face and the other a deed,

(Testimony of Robert Wyllie Davis.)

(that was in January, 1906)—that about that time Sumner went into the possession of Mokapu and used it as his residence and stayed there for over a year,—that is true?

A. I don't remember saying that yesterday. You mean the day before?

Q. I mean is it or is it not true you stated that Sumner took up his residence in Mokapu and stayed there for over a year immediately after the giving of these two instruments? [164]

A. As I stated, he went to Moku Mano, a little island close to Mokapu, before he got this mortgage and deed.

Q. How about after?

A. He used to come over and visit me and stay over there sometimes, and after that, when he had the mortgage and deed, he came over there.

Q. And lived there? A. And lived there.

Q. And he lived there for more than a year?

A. Quite a length of time. It may have been a year or over a year.

Q. It wasn't two years, was it, before he went away?

A. I couldn't say as to that, whether two years or three years.

Q. My note of what you said yesterday is to the effect that after the deed and mortgage were given Sumner then went on to Mokapu and made his home there and stayed there for more than a year, and then he came to Honolulu and the doctor, Dr. MacDonald, told him he was sick and then he stayed

(Testimony of Robert Wyllie Davis.)

away, except for visiting there occasionally, and then stayed away until Jones took hold. How long did Sumner make his home at Mokapu after this so-called deed and mortgage were given?

A. I stated this. He always visited Mokapu even when it was under lease to the Kaneohe Ranch Company, and even when he didn't have the mortgage and deed he used to come there, but after he had the mortgage he went over and carried on a kind of business.

Q. He lived there and slept on the premises and made his home there? A. Yes, sir.

Q. For how long? [165]

A. It may have been a year or a little over a year. I know when he wasn't feeling well he came up here and was confined to his bed and Doctor Macdonald was attending to him, and he was in bed quite a length of time.

Q. After that he made his home at Kalihi, except he made visits to Mokapu?

A. Kalihi has always been his home when he is in town. Of course, when he goes to the country he makes his home at Mokapu. He has that Mokapu as a sort of resort and goes down to look at a few pigs and that way.

Q. When he came to town and was sick and the doctor advised him not to spend a great deal of time at Mokapu, from that time up to the time Mr. Gere took his lease it is true that he just made visits at Mokapu, rather than making his home at Mokapu?

(Testimony of Robert Wyllie Davis.)

(Objected to, as there is no evidence of advice by Dr. Macdonald. Objection overruled.)

A. (No answer.)

Q. After this sickness of Mr. Sumner, from that time up to the time Gere took his lease is it not true his home was up here at Kalihi where he stayed more than half the time, and that his visits were rather infrequent to Mokapu? Don't begin all over again, but just answer the question.

A. The doctor mentioned that to him because he used to drive over himself all alone sometimes and the doctor didn't think fit he should be going over on such a long drive alone, and he would rather he stayed in town until he got quite well, until he made those trips over to Mokapu.

Q. After he became a little better and began visiting Mokapu again, from that time up to the time when Gere took his lease his visits to Mokapu were just occasional visits and his [166] home was in Kalihi?

A. His home was in Kalihi, yes,—when he was in town.

Q. And you were down in charge for him all that time? A. Well, in charge for myself, too.

Q. What do you mean by that, "In charge for myself, too?"

A. I got an interest in the place. I was planting. I was raising a few stock over there for agricultural purposes. I was doing so all the time up to the time Gere got in. As I stated, when I was planting melons Gere came along with a bunch of Caravonica

(Testimony of Robert Wyllie Davis.)

cotton seed and wanted me to plant in between the vines.

Q. So you were running it for your own interest, as well as Mr. Sumner's?

A. Well, Mott-Smith and Brock had charge of his business and after that I believe Carlos Long came in and after that Gere got hold of his business.

Q. Now, Mr. Davis, at the time when this so-called deed was given in January, 1906, to Sumner of an undivided half of Mokapu at the same time there was an agreement drawn up whereby it was agreed in writing between you and Mr. Sumner that if you would within five years of that time pay up the sum of \$2,794.93, with interest at 7% thereon from January 1, 1906, at any time within five years, Sumner would reconvey to you. Now, as a matter of fact, you never paid up that debt to Sumner?

(Objected to as immaterial and not proper cross-examination. Argument. Objection sustained.)

Redirect Examination.

(By E. C. PETERS, Esquire.)

Q. You spoke about Gere going over there, was that about [167] the time Gere was acting as Mr. Sumner's agent? A. Yes.

Q. What was Gere doing over there?

A. He came over there and told me—

Q. I am not asking you what he said. I am asking you what he did. Did he stand on his head, did he raise ducks, did he plant chickens, or what did he do?

(Testimony of Robert Wyllie Davis.)

A. When he came over there, as I stated, he brought this seed over and told me to plant it, and I did so.

Q. Did he plant anything over there?

A. He planted later on some cotton farther down below and he went to work and broke down an old shack we had on the place there for some time—without our permission—and built it up over across from our house and moved in there and started to pick the cotton and gin it, and first thing I knew I saw the bales standing there marked, “A. V. GERE,” and it was shipped to Honolulu and then it went to New York—

Q. Now, when Mr. Gere was over there attending to this cotton did he sleep on the premises?

A. He asked if he could have a room in my house, and I said, “Yes.”

Q. During what period of time, how long did he raise cotton and live on the premises?

A. He was over to our house for a few months, and moved over across to the place where they ginned the cotton.

Q. And that was during the time he was agent for Mr. Sumner?

A. That was during the time he was agent for Mr. Sumner.

Mr. PETERS.—I desire to offer in evidence the *complain* in the case of Cecil Brown, Trustee, vs. Robert Wyllie Davis, [168] numbered and docketed in this Court as “Equity No. 1828.”

(Testimony of Robert Wyllie Davis.)

(Objected to as incompetent, irrelevant and immaterial.)

(Argument.)

Mr. LYMER.—We admit that Robert Wyllie Davis took a half of our term of years, 25 term of years.

Mr. PETERS.—On that admission the complaint is admissible in evidence.

The COURT.—If that is the purpose of the admission, it is merely cumulative now.

Mr. PETERS.—It may be considered cumulative, but we submit we are entitled to have it in for all it is worth.

Mr. LYMER.—I say it is absolutely unnecessary, unless counsel points out some other reason.

The COURT.—If the evidence is offered solely for the purpose of showing an admission by Cecil Brown, Trustee, the petitioner in the case of Cecil Brown, Trustee, *vs. Davis*, that Robert Wyllie Davis was the owner of a one-half undivided interest for a term, the Court is of the opinion it is apparently cumulative and should not be admitted.

Mr. PETERS.—We desire it for the further purpose of showing that as far as the bill is concerned the mortgage did not convey the beneficial interest, and that at the best then the plaintiff in this case is entitled to his undivided quarter.

(Argument.)

The COURT.—The fact that it can be argued that the complaint is an admission, whether or not

(Testimony of Robert Wyllie Davis.)

the Court agrees with that argument, seems to me to present the proposition that the complaint ought to be in evidence. It would have [169] been material before the admission of counsel that Davis had taken a half interest. Although the Court may or may not agree with that, it seems to me it ought to go in for what it is worth.

**[Testimony of George K. Kopa, for Defendant
(Recalled).]**

GEORGE K. KOPA, was recalled as a witness for the defendant, and testified as follows:

Direct Examination.

(By EMIL C. PETERS, Esq.)

Q. Mr. Kopa, have you produced the power of attorney from A. V. Gere and the revocation of that power of attorney contained in Liber 331, Page 90 et seq., dated November 4, 1909? A. I have.

(By agreement of counsel the documents referred to were considered as read into the record by the witness.)

Q. And bearing the notation, "Revoked, see Rev. P. A., Book 336, Page 36"—

Mr. LYMER.—No objection.

(Documents referred to received in evidence and considered as read in evidence.)

Q. And the revocation, Book 336, Page 36, will also be admitted and considered read?

Mr. LYMER.—No objection.

(Received in evidence and considered read by the witness.)

(Defendant rests.) [170]

[**Testimony of George K. Kopa, for Plaintiff
(Recalled).**]

GEORGE K. KOPA, was recalled as a witness for the plaintiff and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Mr. LYMER.—I take it that I am not waiving my objections heretofore made?

The COURT.—The Court has reserved its ruling.

Mr. LYMER.—I think I shall be safe if counsel stipulates with me that entering into the evidence, both documentary and oral, having to do with any of the documents presented by the defendant and having to do with any claim made by Davis that his entire interest in Mokapu had been vested in John K. Sumner at a time antecedent to the execution of the 25-year leasehold from Holt, Trustee, to Gere is all done expressly saving the right of the plaintiff to press his objection that all such evidence is incompetent, irrelevant, and immaterial, having nothing to do with any of the issues of the case and likewise that all of such evidence is not available to the defendant because the defendant is estopped,—in other words the defendant just prejudices his case.

Mr. PETERS.—I consent to that, that all evidence available, either direct or cross, stays in.

Mr. LYMER.—Oh, no, you don't—

Mr. PETERS.—I insist upon the right to use every bit of evidence which may be available for

(Testimony of George K. Kopa.)

this defendant. I am willing to have you go on and put on evidence, but I think it reasonable to insist that I get the benefit of any evidence adduced by you. You cannot be in the position to withdraw this entire evidence, if the Court decides the question in your favor as to the main issue, as to the deed and mortgage. [171] If you are going to meet my evidence. I am going to insist upon the defendant availing himself of every bit of evidence adduced, whether the Court rules in your favor or not.

Mr. LYMER.—That practically tells me either to move for judgment or let certain important protection around my client go by the board; so at this time I will excuse Mr. Kopa and move for judgment for the plaintiff upon the grounds, first, that the defendant in his case has not adduced sufficient evidence to meet the *prima facie* case established by the plaintiff before plaintiff rested, and on the specific ground that the deed from Robert Wyllie Davis to John K. Sumner, dated January 1, 1906, and recorded in Liber 302, Page 192, as well as the mortgage from the said Robert Wyllie Davis to John K. Sumner, dated January 2, 1906, recorded in Liber 303, Page 91, are neither of them proper evidence in the case, both the deed and mortgage aforesaid, not showing or tending to show defect in the plaintiff's title to an undivided half interest in Mokapu in a term of years and being no defense which may be pressed with success against the granting of a decree for the plaintiff as prayed for, and that the

(Testimony of George K. Kopa.)

deed and mortgage are as evidence not available to this defendant, said defendant being estopped to introduce evidence of this character, to wit, evidence as to title or rights in the land of Mokapu outstanding in him, or any evidence whatsoever of any conveyances which have as their source or which have the Sumner trust deed as the source from which such titles are traced.

The COURT.—Any objection to granting this motion?

Mr. PETERS.—I don't believe the motion is well taken. I [172] should like to submit a brief.

The COURT.—It is ordered to be submitted on briefs.

(Adjourned *sine die.*)

On Monday, April 27, 1914, at the hour of two o'clock P. M., all parties to the action being present in court, the following further proceedings were had and testimony taken:

Mr. LYMER.—At this time I withdraw a motion for judgment made at the last hearing and desire to proceed with further evidence, stating that this action on my part is done while saving my rights to except and object to the introduction of the documents heretofore introduced.

**[Testimony of George K. Kopa, for Plaintiff
(Recalled in Rebuttal).]**

GEORGE K. KOPA, was recalled as witness in rebuttal for the plaintiff, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. I hand you a book and ask you to state what it is. A. Book 336.

Q. Of the records on file in the office of the register of conveyances in Honolulu? A. Yes, sir.

Q. Turn to Page 247 of that liber and state what is there to the Court?

A. I find an agreement made between John K. Sumner and Robert W. Davis.

Q. And the date of that was what?

A. Dated January 1, 1906. [173]

Q. Will you read it to the Court?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove or disprove any of the issues in the case—Argument.)

(Question withdrawn.)

**[Testimony of A. V. Gere, for Plaintiff (in
Rebuttal).]**

A. V. GERE, a witness for the plaintiff in rebuttal, was duly sworn, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Where do you live? A. Honolulu.

Q. Do you know Mr. John K. Sumner, the grantor of the Sumner trust deed? A. I do.

(Testimony of A. V. Gere.)

Q. Do you know Robert Wyllie Davis, the beneficiary of the Sumner trust deed? A. I do.

Q. And the defendant in this action? A. I do.

Q. Are you familiar with the land known as Mokapu on this island? A. I am.

Q. Have you at any time during the past years resided on the land known as Mokapu?

A. I have.

Q. Have you had anything to do with the land of Mokapu in a business was for exploiting that land for agricultural or other purposes? A. I have.

Q. When did you first take up this Mokapu in a business way? A. The latter part of 1909.

Q. About what month, do you remember? [174]

A. I think September or October.

Q. Who was living on Mokapu, if you know, at that time?

A. My first trip to Mokapu was with John K. Sumner.

Q. When was that?

A. That was either September or October, 1909, and he said that Mr. Davis was living on the land, but he wasn't there.

(Moved to strike out answer as to Davis as hearsay.)

(Argument—Ruling reserved.)

(Question withdrawn.)

Q. State to us the history of your business dealings down at Mokapu from that time, in October, paying particular attention in your testimony to the

(Testimony of A. V. Gere.)

matter of actual possession of Mokapu during that time?

(Objected to, as there is no question to withdraw, unless it is understood that both question and answer go out.

Mr. LYMER.—Let it be so understood.

A. In the middle, some time in the middle of October, I think it was.

Q. 1909?

A. 1909. I made an agreement with Mr. Wallie Davis who was living on Mokapu at that time.

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove or disprove any of the issues of the case and not the best evidence—Objection overruled—Exception.)

A. (Witness continues.) And as a result of the agreement with Mr. Davis I went over to Mokapu later on and resided there.

Q. What time did you take up your residence on Mokapu?

A. Off and on from October, 1909, until somewhere along [175] in the middle or early part of 1911.

Q. State explicitly the character of your residence there, Mr. Gere, between September or October, 1909, and the first part of 1910.

A. To start in with I went over occasionally looking after things. I took over some seventy-five dollars' worth of cotton seed and other things. I took over various stock of chickens and geese and turkeys

(Testimony of A. V. Gere.)

and various animals, mules and wagons, and went ahead cultivating the land of Mokapu. I lived in Mr. Davis' house; had a room in his house, and I later on spent nearly all of my time in Mokapu, coming to Honolulu only occasionally.

Q. Now, with regard to the period of time between September or October, 1909, and the first of 1910, what can you say as to whether or not Mr. Sumner was living on Mokapu?

A. Mr. Sumner never went to Mokapu during my connection with the place from the latter part of October, 1909, until I left in April, 1911; was never at Mokapu any of that period. Mr. Davis was spending most of his time in Kaneohe. He had started in a taro business and was back and forth—

(Moved to strike out answer as not responsive.)

(Motion denied—Exception.)

A. (Witness continues answer.) I say he had a taro and poi business in Kaneohe and was spending a great part of his time in Kaneohe, going back and forth. He took a boat over there for convenience in going back and forth from Kaneohe to Mokapu.

(Moved to strike out as not responsive and voluntary statement of the witness—Motion granted.)

[176]

Q. You have stated that you made an agreement with Wyllie Davis as a result of which this work of yours and interest in Mokapu followed, of which you have testified. Do you remember when you took from John D. Holt, Trustee, the 25-year leasehold which is in issue in this suit?

(Testimony of A. V. Gere.)

A. Sometime in the middle or early part or latter part of 1910.

Q. I may say, Mr. Gere, that is dated June, 1910. At the time this lease was given, where were you?

A. I was living at Mokapu.

Q. Were you still working under the agreement with Wallie Davis at the time you took this 25-year leasehold?

(Objected to as incompetent, irrelevant, and immaterial.)

(Argument. Objection overruled. Exception.)

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

(Moved to strike answer, as witness says there were two agreements and contents we do not know.)

(Argument. Motion denied. Exception.)

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gere, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his interest to Sumner was discussed?

(Objected to, as we don't know of any agreements and the time is indefinite. Objection overruled. Exception.) [177]

A. I was.

(Testimony of A. V. Gere.)

Q. State, as nearly as possible, the time when this conversation was?

A. It was somewhere about the middle of 1909, towards the latter part of 1909. It may have been August or September of 1909.

Q. Where was this conversation held?

A. In my office.

Q. Who was present?

A. Mr. Sumner, Mr. Davis, Mr. Davis' wife and myself. Mr. Sumner sent for them to come to my office and desired them to deed over to him their interests in Mokapu—

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove or disprove any of the issues of this case. Argument.)

The COURT.—Of course, the testimony has to be directed to the time the statement was made. I do not know of any rule which limits time after making of the deed to show what was the intention at the time of making the deed. Motion denied.

(Exception.)

Q. You were answering a question of mine and had stated you were in your office at a time when Wallie Davis and his wife and Sumner were all three there. State what was discussed.

(Objected to as incompetent, irrelevant, and immaterial.)

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

(Objected to as irrelevant, incompetent, and im-

(Testimony of A. V. Gere.)

material, not tending to prove or disprove any of the issues of this case and calling for a conclusion of the witness.) [178]

(Objection overruled. Exception.)

A. Mr. Sumner asked Mr. Davis and his wife to deed to him the land of Mokapu, and Mr. Davis and his wife both objected and his wife got especially put-out and angry over it,—at the idea of asking them to deed the land to him, and they left.

Q. Just answer “Yes” or “No” to this question. Did you ever know from Wallie Davis’ own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face?

(Objected to as incompetent, irrelevant, and immaterial and indefinite.)

(Argument. Objection overruled. Exception.)

A. Yes.

Q. When, as nearly as you can state, without stating what was stated, was it? About when?

A. That I cannot recall.

Q. Approximately when was it, before you went down to Mokapu in September or October, 1909, or was it after?

A. It was during my residence at Mokapu. While I was engaged with Mokapu.

Q. Was it before or after the giving of this 25-year term? A. No, it was before that.

Q. And where was the statement made?

A. I think in his own residence at Mokapu.

Q. Who was present?

(Testimony of A. V. Gere.)

A. I don't remember anybody but Mr. Davis and myself. His wife may have been there, but I don't think so. I think just Mr. Davis and myself. [179]

Q. Will you state what that statement was?

(Objected to as incompetent, irrelevant, and immaterial, not proving or tending to prove any material issue of the case. Objection overruled. Exception.)

A. He stated that he and Mr. Sumner had gone into partnership together for the purpose of raising pigs and cattle, I think, and other purposes. The partnership didn't flourish, and, I think—I don't remember the man's name now—Mr. Brock, that is it—Mr. Brock had finally effected a settlement of the partnership agreement and I believe he had sold all of the stock and pigs and various things, realized on the partnership, and there was quite a loss, and, I think, Mr. Davis had given security to cover the amount of the loss. That is the best recollection I can give as to the conversation I had with him.

Q. Was there anything more definite stated by Davis as to the nature of the security given?

A. I don't recollect the conversation, excepting as the facts come to me now. I know he had executed a mortgage and a deed—I believe a deed and a mortgage both, but I don't know the details, excepting—It is hazy. I knew he went over with me and explained the proposition, because he was telling me about the pigs; how two of the pigs had got away after the sale, and he had found them later in the pasture beyond, and he found them and they had little ones and he got a start again with them.

(Testimony of A. V. Gere.)

Q. Was there anything you can recall as being said by Mr. Davis with regard to the deed?

A. No; nothing that I heard from Mr. Davis would lead me [180] to think he had done anything more than to give Sumner security.

Q. You stated you went into this Mokapu business down there with Wallie Davis some time about October, 1909, and that you made visits very frequently from time to time and then you took up your residence there. About what time did you take up your residence there and occupy this room in Wallie Davis' house? A. Early part, I think, of 1910.

Q. And how long, then, did you live on Mokapu occupying a room in Wallie Davis' house?

A. It must have been a year and a half.

Q. State, if you can, do you know where John K. Sumner was living from October, 1909, until the year 1911? A. I do.

Q. Where? A. Kalihi.

Q. How do you know?

A. I have been at his home. Seen him at his house.

Q. How frequently have you been in his house? How frequently have you called at the Kalihi home of Mr. Sumner during this period?

A. I don't know; perhaps eight or ten times.

Q. You never saw him at Mokapu?

A. Only once when I went over with him in August or September, 1909; I think it must have been.

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he spoke of giving Mokapu as security, did he mention anything about

(Testimony of A. V. Gere.)

the amount of the advances which he had secured?

(Objected to as incompetent, irrelevant, and immaterial. [18I] Objection overruled. Exception.)

A. I don't know whether he did or not. I am under the impression it was several thousand dollars. Where I got that impression from, I don't know; I don't know whether Mr. Davis ever mentioned the amount or not. I am under the impression that he did, but I could not say.

Q. What time did you say you left Mokapu?

A. I think it was about the middle of 1911; it may have been earlier than that.

Q. Do you know of your own knowledge who took possession after you left? A. I do.

Q. Who? A. Mr. Fred Harrison.

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910?

(Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Exception.)

A. I had a conversation with Mr. Davis. I don't remember any conversation with Mr. Sumner.

Q. Where was this conversation with Mr. Davis?

A. Both at Mokapu and in Honolulu.

Q. When was the first of these conversations?

A. At Mokapu.

(Testimony of A. V. Gere.)

Q. When?

A. Prior to the execution of the lease from J. D. Holt to myself. [182]

Q. What was the substance of that conversation?

(Objected to as incompetent, irrelevant, and immaterial and not proper rebuttal.)

(Argument.)

Mr. LYMER.—I offer to connect it up with Sumner's understanding.

(Objection sustained.)

Cross-examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Gere, you are the same gentleman, are you not, named in a certain power of attorney from John K. Summer to A. V. Gere, offered in evidence in this case? I haven't the date at hand, but the evidence discloses it was recorded in Liber 331 at page 90.

The COURT.—November 4, 1909.

A. If I can see it I can tell you.

Q. Have you been attorney in fact of Mr. Sumner upon more than one occasion? A. I have.

Q. When were you first attorney in fact of Mr. Sumner?

(Objected to as incompetent, irrelevant, and immaterial.)

(Argument.)

(Adjourned to two o'clock P. M., Tuesday, April 28, 1914.)

At the hour of two o'clock P. M., Tuesday, April 28, 1914, all parties to the action being present in

(Testimony of A. V. Gere.)

court, the following further proceedings were had and testimony taken:

Mr. LYMER.—If the Court please, I will ask that the name of Mr. B. C. Ulrichs be entered of record as assisting counsel [183] at this time. At the adjournment yesterday there was a question propounded by counsel to this witness, and, if the Court will permit it, I should like Mr. Ulrichs to speak about two minutes on the proposition of that objection.

The COURT.—Let Mr. Ulrichs' name be entered of record as assisting counsel.

Cross-examination (Continued).

(By WILLIAM B. LYMER, Esq.)

(Argument resumed.)

The COURT.—The matter may be submitted on briefs. Counsel will be given three, three, and two to file briefs and reply briefs.

(Adjourned *sine die*.)

On Tuesday, June 23, 1914, at the hour of 2:10 o'clock P. M., all parties to the action being present in court, the following further proceedings were had and testimony taken:

Mr. LYMER.—Before this case proceeds to final judgment, I should like the privilege of amending the last prayer of the complaint. I think as it stands it is probably legally all right, but, if the Court thinks it proper, I should like to substitute this phraseology: "Wherefore plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed

(Testimony of A. V. Gere.)

of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted, and [184] that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

The COURT.—The plaintiff herein is granted permission to amend his prayer as follows: "Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted and that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

Mr. PETERS.—I enter formal objection to the amendment as coming too late.

The COURT.—The objection will be overruled and exception allowed.

Mr. LYMER.—Is your Honor disposed at this time to rule on the various matters held under consideration by your Honor for some time now as to

(Testimony of A. V. Gere.)

evidence adduced by counsel for the defense?

The COURT.—Those matters had better be called to the attention of the Court again or else I shall have to go through my notes and find out what they are.

Mr. PETERS.—As I recollect, the only three matters to rule on were the objection to the admission of the mortgage in evidence, the objection to the admission of the deed in evidence, and the objection on the cross-examination of the last witness. There is where we stopped. [185]

The COURT.—The objection to the introduction of the deed of Robert Wyllie Davis and wife to Sumner, recorded in Liber 302, page 192, and the objection to the introduction of the mortgage of Robert Wyllie Davis and wife to Sumner, recorded in Liber 303, page 91, are sustained.

Mr. PETERS.—To which ruling of the Court we respectfully except in both instances.

(Exception allowed.)

The COURT.—The objection to the cross-examination of A. V. Gere occurring on April 27, 1914, is sustained.

Mr. PETERS.—To which we respectfully except.
(Exception allowed.)

Mr. LYMER.—In view of the Court's ruling, I should like to move for judgment at this time on the following grounds:

1. On the ground that the evidence introduced by defendant, being evidence solely of an alleged title outstanding in a stranger to this suit, does not con-

stitute a defense to the plaintiff's *prima facie* case against defendant.

2. On the ground that the evidence introduced by defendant in opposition to plaintiff's *prima facie* case is not available to defendant, he being estopped to show any outstanding title in a stranger to this controversy and being limited to a showing of a superior title in himself as against plaintiff, and having offered no evidence showing or tending to show a title in defendant superior to plaintiff's title, plaintiff is entitled to judgment herein.

3. That the evidence offered by defendant, even if available to him, is not sufficient to meet and controvert plaintiff's *prima facie* showing in this case, in that the transfers by defendant to John K. Sumner in 1906, put in evidence by defendant, do not operate to deprive the trustee [186] under the Sumner trust deed of his power to effectuate leases on the premises in question, nor is there any evidence, independent of said documents of transfer showing or tending to show that the lease for years which is the subject of this litigation was invalidly created or improperly assigned, as to a portion thereof, to the plaintiff herein.

Mr. PETERS.—None of these questions of law are involved. The Court has sustained the objections.

(Argument.)

Mr. LYMER.—I believe counsel is correct and the motion is withdrawn.

The COURT.—The Court finds for the plaintiff for an undivided half of the term of years set out in the complaint herein.

Mr. PETERS.—To which we respectfully except on the ground that the decision of the Court is against the law and the evidence and the weight of the evidence.

The COURT.—Exception allowed.

(Adjourned *sine die.*) [187]

I CERTIFY that the foregoing is a full, true, and correct transcript of my stenographic notes taken on the trial of the above-entitled case.

H. R. JORDAN,

Official Shorthand Reporter.

Honolulu, August 4, 1914.

[Endorsed]: Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robt. Wyllie Davis. Transcript of Evidence. Filed Aug. 4, 1914. A. K. Aona, Clerk.

No. 814. Rec'd and filed in the Supreme Court, Nov. 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [188]

[Plaintiff's Exhibit "A"—Lease.]

Stamped \$2.

This Indenture of Lease made this 1st day of June A. D. 1910, between John D. Holt, Trustee of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee,

Whereas, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136 pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii conveyed unto Bruce Cartwright of the same

place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, nevertheless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust.

And whereas, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii. Now this Indenture witnesseth:

That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

To have and to hold the same with all the rights, privileges and appurtenances thereunto belonging or in anywise [189] appertaining, unto the said lessee, his executors, administrators and assigns for and during the term of Twenty-five years from the First day of June, A. D. 1910.

Yielding and paying therefor rent as follows:

For the First year the rental shall be free;

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per

year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500.00) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenant with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

JNO. D. HOLT,
Trustee.

A. V. GEAR.

[Plaintiff's Exhibit "A"—Consent and Confirmation of Lease by Davis et ux. Dated June 1, 1910, Between Holt, Trustee, and Gear.]

KNOW ALL MEN BY THESE PRESENTS, that I, Robert Wyllie Davis of Mokapu, Koolaupoko, Island of Oahu, and I, Mary [190] Kealohanui Davis wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust.

ROBERT WYLLIE DAVIS.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me personally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

**[Plaintiff's Exhibit "A"—Assignment of Lease by
A. V. Gear to C. A. Peterson, October 12, 1910.]**

Stamped \$2.

I, A. V. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee named in the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained, do hereby assign, transfer and set over to C. A. Peterson of said Honolulu, the foregoing lease, the prem-

ises thereby demised, and all right, title and interest in and under the same. And I, the said assignee, in consideration [191] of the foregoing assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof the parties hereto have hereunto and to another instrument in duplicate of like w.s. tenor and date, interchangeably set their hands and seals this 12th day of Oct. A. D. 1910.

A. V. GEAR.

CHAS. A. PETERSON.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

**[Plaintiff's Exhibit "A"—Assignment of Lease by
C. A. Peterson to Addie B. Gear, October 12,
1910.]**

Stamped \$2.

I, C. A. Peterson of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained do hereby assign, transfer and set over to Addie B. Gear of said Honolulu, the foregoing lease, the premises thereby demised, and all the right, title and interest which I have in and under the same. And I, the said assignee, in consideration of the fore-

going assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate of like w.s. tenor and date, interchangeably set their hands and seals this 12th day of [192] Oct. A. D. 1910.

CHAS. A. PETERSON.

ADDIE B. GEAR.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 14th day of October, 1910, before me personally appeared A. V. Gear, Chas. A Peterson and Addie B. Gear, to me known to be the persons described in and who executed the two foregoing instruments and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,

Notary Public, First Judicial Circuit, Territory of
Hawaii.

**[Plaintiff's Exhibit "A"—Assignment of Lease by
C. A. Peterson to Addie B. Gear, October 12,
1910.]**

Stamped \$2.

I, Addie B. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar to me in hand paid, do hereby assign, transfer and set over to Fred Harrison of said Honolulu, the foregoing lease, the premises thereby demised, and all of the right, title and interest which I have in and under the same, which is an undivided half interest.

In witness whereof I have hereunto set my hand and seal this 21st day of October, A. D. 1910.

ADDIE B. GEAR.

City and County of Honolulu,
Territory of Hawaii,—ss.

On this 15th day of November, A. D. 1910, before me personally appeared Addie B. Gear, to me known to be the person described in and executed the foregoing [193] instrument, and acknowledged that she executed the same as her free act and deed.

ANTONE MANUEL,

Notary Public, First Circuit, Territory of Hawaii.

Entered of record this 6th day of May, A. D. 1911, at 10:53 o'clock A. M., and compared. Chas. H. Merriam, Registrar of Conveyances.

OFFICE OF
THE
REGISTRAR OF CONVEYANCES.

Honolulu, Hawaii, Oct. 31, 1911.

The foregoing is a true copy of record, recorded in the office of the Registrar of Conveyances of the Territory of Hawaii in Book 343, pages 347-351.

[Seal] Attest: CHAS. H. MERRIAM,
Registrar of Conveyances for the Territory of
Hawaii.

[Endorsed]: "B." Certified Copy Lease and Assignments. John K. Sumner by Tr. to A. V. Gear. Dated June 1, 1910. Recorded in Book 343, pages 347-351. Registry of Conveyances for the Territory of Hawaii, at Honolulu.

L. No. 7783. Received in Evidence Oct. 17, 1913, and marked Plff's Exhibit "A" Identification. A. K. Aona, Clerk.

L. No. 7695. Received in Evidence June 5th, 1913, and marked Plaintiff's Exhibit "A." J. Marcallino, Clerk.

No. 757. Received and filed January 14, 1914, in the Supreme Court, at 8:40 o'clock A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [194]

[Plaintiff's Exhibit "C"—Assignment of Lease,
June 6, 1913, Addie B. Gear to Fred Harrison.]

THIS INDENTURE made this 6th day of June,
A. D. 1913, between ADDIE B. GEAR, of Honolulu,

City and County of Honolulu, Territory of Hawaii, party of the first part, and FRED HARRISON, of Honolulu aforesaid, party of the second part:

WITNESSETH.

WHEREAS, said party of the first part by that certain Assignment dated October 21, 1910, and recorded in Liber 343 at page 351 of the Hawaiian Registry of Conveyances in said Honolulu, did assign unto said party of the second part all her right, title and interest in and to that certain leasehold for the term of twenty-five (25) years on that certain land situate at Koolaupoko, Oahu, Territory of Hawaii, known as the land of Mokapu, said leasehold having been originally created by Deed of John D. Holt, Trustee, to A. V. Gear, by that certain Indenture of Lease dated June 1, 1910, and recorded in said Registry in Liber 343 at page 347; and,

WHEREAS, by that certain agreement in writing dated October 24, 1910, but executed simultaneously with said Assignment above referred to the said party of the second part covenanted and agreed with the said party of the first part that he would reconvey said premises covered by said Assignment in the event that certain promissory notes in said Agreement described should be fully met and paid by said A. V. Gear on or before December 31, 1911, and that said party of the second part should be fully reimbursed for any other and additional sums of money by him advanced on account of said promissory notes; and,

WHEREAS, said promissory notes were not paid

prior to [195] said 31st day of December, 1911, and have not been paid to date, and the party of the first part herein and said A. V. Gear are both unable to meet the payments called for by said Agreement of October 24, 1910;

NOW, THEREFORE, the said party of the first part, in consideration of the premises and of the sum of One (\$1.00) Dollar to her paid by said party of the second part, receipt whereof is hereby acknowledged, does hereby transfer, assign, set over and convey all of her right, title and interest, both legal and equitable, in and to the real estate described in said lease of June 1, 1910, and thereafter, by mesne conveyances vested in said party of the first part, and all her right, title and interest in said Indenture of Lease unto said party of the second part, his executors and assigns, to have and to hold the same for the entire unexpired term of said lease.

And said party of the second part hereby covenants with said party of the first part that he will pay the rent which may hereafter become due according to the terms of said lease and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands the day and year first above written.

ADDIE B. GEAR. (Seal)

FRED HARRISON. (Seal)

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 6th day of June, A. D. 1913, before me [196] personally appeared Addie B. Gear and Fred Harrison, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] J. R. KENNY,
Notary Public First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: C. L. 7783. Recd. in evidence Oct. 17, 1913, and marked Plaintiff's Ex. "C." J. Marcallino, Clerk.

No. 757. Rec'd and filed January 14, 1914, in the Supreme Court, at 8:40 o'clock A. M. J. A. Thompson, Clerk.

No. 814. Received and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [197]

[Plaintiff's Exhibit "D"—Quitclaim Deed, June 9, 1913, Cecil Brown, Trustee, to Fred Harrison.]

THIS INDENTUDE made this 9th day of June, A. D. 1913, by and between CECIL BROWN, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, party of the the first part, and FRED HARRISON, also of said Honolulu, Territory of Hawaii, party of the second part:

WITNESSETH:

That the said party of the first part for and in consideration of the sum of One Dollar (\$1.00) to him

paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby remise, release and forever quitclaim unto the said party of the second part all his right, title and interest in and to the undivided one-half ($1\frac{1}{2}$) interest of Addie B. Gear in and to that certain Indenture of Lease made by and between John D. Holt, trustee, and A. V. Gear, dated June 1, 1901, and recorded in Liber 343 at pages 347-351 of the Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Being the property conveyed to said party of the first part by deed of Job Batchelor, Commissioner, dated February 29, 1912, and recorded in said Registry in Liber 366 at pages 140, 141.

TO HAVE AND TO HOLD the same unto the said party of the second part, his successors and assigns to his and their own use and behoof forever.

IN WITNESS WHEREOF, said party of the first part has hereunto set his hand and seal the day and year first hereinabove written.

CECIL BROWN. (Seal)

In presence of

W. A. DICKSON. [198]

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 8th day of October, A. D. 1913, before me personally appeared Cecil Brown, *know* to me to be the person described in and who executed the foregoing instrument and acknowledged that he executed

the same as his free act and deed as said Trustee.

[Seal]

J. R. KENNEY,

Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: D. L. No. 7783. Received in Evidence Oct. 17, 1913, and Marked Plff's Exhibit "D."
A. K. Aona, Clerk.

No. 757. Rec'd and filed January 14, 1914, in the Supreme Court at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [199]

**[Plaintiff's Exhibit "E"—Assignment of Lease,
June 16, 1910, A. V. Gear to Robert Wyllie
Davis.]**

KNOW ALL MEN BY THESE PRESENTS, that I, A. V. Gear of Honolulu, city and county of Honolulu, Territory of Hawaii, lessee under a certain Indenture of Lease between John D. Holt, trustee, of said Honolulu lessor and the said A. V. Gear as lessee, dated the first day of June A. D. 1910, wherein the said lessor leases to the said lessee the land of Mokapu as therein described for a term of Twenty-five years on certain terms and conditions therein set forth;

Now I, the said A. V. Gear for and in consideration of the sum of One (\$1.00) Dollar to me in hand paid by Robert Wyllie Davis of Mokapu, Koolaupoku, city and county of Honolulu, Territory of Hawaii, the receipt whereof is hereby acknowledged,

and the undertaking of the said Robert Wyllie Davis to observe all the conditions and covenants to be observed and performed by the lessee in the aforementioned lease jointly with the said A. V. Gear, do hereby sell, assign, transfer, and set over unto the said Robert Wyllie Davis an undivided one-half interest in the said lease and in the use of the premises thereby leased and in the profits to be derived therefrom for the whole of the term of said lease,

TO HAVE AND TO HOLD the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said Robert Wyllie Davis, his executors, administrators and assigns for and during the term of Twenty-five years from the first day of June, A. D. 1910.

IN WITNESS WHEREOF, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals this 16th day of June, A. D. 1910.

A. V. GEAR.

I, John D. Holt, Trustee, lessor, hereby consent to the above assignment by the lessee of an undivided half interest in the aforementioned lease.

JOHN D. HOLT.

Honolulu, June 16th, 1910. [200]

[Endorsed]: Plff's Ex. "E." L. No. 7783. Received in Evidence Oct. 17, 1913, and Marked Plff's Exhibit "E." A. K. Aona, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [201]

[Defendant's Exhibit 1 — Assignment of Lease, October 24, 1910—Fred Harrison to Addie B. Gear.]

THIS INDENTURE made this 24th day of October, A. D. 1910, by and between Fred Harrison of Honolulu, city and county of Honolulu, Territory of Hawaii, and Addie B. Gear of Honolulu aforesaid,

WITNESSETH:

That whereas said Fred Harrison has this day endorsed those two certain promissory notes executed by A. V. Gear of even date herewith, one in the sum of \$1767.35 and payable six months from date thereof and one in the sum of \$1760.00 and payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of 8% per annum.

And whereas in order to partly secure said Fred Harrison said Addie B. Gear has assigned to Fred Harrison that certain Indenture of Lease of the land of 'Mokapu,' made by and between John D. Holt, Trustee and A. V. Gear and dated June 1st, 1910; the interest of said Addie B. Gear in said Indenture of Lease being an undivided half-interest.

NOW THIS INDENTURE WITNESSETH, That I the said Fred Harrison hereby agree to assign over, transfer and set over to said Addie B. Gear said Indenture of Lease of the land of 'Mokapu,' provided that those two certain promissory notes

executed by A. V. Gear of even date herewith and endorsed by me, one in the sum of \$1767.35 and payable six months from date thereof and one in the sum of \$1767.00 and payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of 8% per annum are fully met and paid by the said A. V. Gear and that I am fully reimbursed on or before the 31st day of December, 1911, for any sums of money that I have to pay out by reason of or on account of said endorsements, together with interest thereon at the rate of 8% per annum. It being further agreed and understood however, that in the event of said promissory notes being paid in full on or before the dates thereof, or that I am fully reimbursed on or before the 31st day of December, A. D., 1911 for any sums of money that I have to pay out by reason of said endorsements, that I am still entitled to receive and have for the full term of said Lease one-half of the profits accruing or derived under said lease, and it is further understood and agreed that I the said Fred Harrison am not to be called [202] upon or be compelled to contribute or pay any sum or sums of money towards or on account of any business carried on upon the land described in said lease, or be compelled to contribute towards or to pay any share in any losses incurred in any business carried on upon said land of 'MOKAPU.'

And I the said Addie B. Gear in consideration of the premises and of the sum of one dollar to me paid the receipt whereof is hereby acknowledged, do

hereby agree that upon the assignment to me of the Lease hereinbefore mentioned, that I will and my heirs, administrators, executors and assigns shall for and during the full term of said lease pay over to said Fred Harrison one-half of the *profits* derived under the said lease, and further that I will not demand of said Fred Harrison any sum or sums of money towards carrying on any business whatsoever upon said land of 'Mokapu,' or on account of the payment of any losses incurred in any business conducted or carried on upon said land.

In Witness whereof the said Fred Harrison and said Addie B. Gear have hereunto and to another instrument of even date and tenor, set their hands and seals the day and year first above written.

FRED HARRISON.

ADDIE B. GEAR.

City and County of Honolulu,
Territory of Hawaii,—ss.

On this 24th day of October, A. D., 1910, before me personally appeared Fred Harrison, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal]

ANTONE MANUEL,

Notary Public, First Circuit, Territory of Hawaii.

City and County of Honolulu,
Territory of Hawaii,—ss.

On this 15th day of November, A. D., 1910, before me personally appeared Addie B. Gear, to be known to be the person described in and who executed the

foregoing instrument and acknowledged that she *exxcutd* the same as her free act and *de* deed.

[Seal]

ANTONE MANUEL,

Notary Public, 1st Circuit, Territory of Hawaii.

[203]

[Endorsed]: L. No. 7783. Received in Evidence Oct. 17, 1913, and Marked Deft's Exhibit 1. A. K. Aona, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [204]

[Defendant's Exhibit 2—Assignment of Lease, November 16, 1910—A. V. Gear to Fred Harrison.]

THIS INDENTURE, made this 16th day of November, A. D. 1910, by and betwen A. V. Gear, of Honolulu, City and County of Honolulu, Territory of Hawaii, of the first part, and Fred Harrison, of Honolulu aforesaid, party of the second part,

WITNESSETH:

THAT WHEREAS *aaïd* Fred Harrison on the 24th day of October, A. D. 1910, did endorse those two certain promissory notes executed by A. V. Gear on said 24th day of October, A. D. 1910, one in the sum of Seventeen Hundred and Sixty-seven Dollars and Thirty-five Cents (\$1,767.35), and payable six months from date thereof, and one in the sum of Seventeen Hundred and Sixty-seven Dollars (\$1,767.-

00), payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of eight per cent per annum;

AND WHEREAS in order to partly secure said Fred Harrison said A. V. Gear is desirous and willing to convey to said Fred Harrison certain property, crops, machinery and utensils now being and situated on the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, as Lessor, and A. V. Gear as Lessee, dated June 1st, A. D. 1910:

NOW THIS INDENTURE WITNESSETH:

THAT said A. V. Gear, in consideration of the premises and the sum of One Dollar to him paid, the receipt whereof is hereby acknowledged, doth hereby assign, transfer, set over and convey unto said Fred Harrison, all the right, title and interest which said A. V. Gear may have in and to the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, together with all growing crops, harvested crops, machinery, tools, buildings, live stock of all kinds [205] and description, plows, harnesses, boats and all personal property of whatsoever kind and nature.

TO HAVE AND TO HOLD unto the said Fred Harrison, his heirs, administrators and assigns, to his and their own behoof forever.

PROVIDED ALWAYS that if said A. V. Gear shall pay to said John K. Sumner those two certain

promissory notes executed by A. V. Gear on the 24th day of October, A. D. 1910, one in the sum of \$1,767.35, and payable six months after date thereof, and one in the sum of \$1,767.00, and payable in twelve months from the date thereof, both payable to the order of said John K. Sumner, and shall further reimburse said Fred Harrison, before the 31st day of December, A. D. 1911, for all sums of money paid out on account of or by reason of said endorsements, and shall observe and perform all of the covenants herein contained and on the part of said A. V. Gear to be performed, then these presents shall be void. But upon failure of said A. V. Gear to reimburse said Fred Harrison on or before the 31st day of December, A. D. 1911, for all moneys paid out by said Fred Harrison by reason of said endorsements, or upon the breach by A. V. Gear of any condition herein contained, then said Fred Harrison is hereby expressly authorized and empowered to take possession of said land of Mokapu and all growing crops, harvested crops, machinery, tools, buildings, live stock of all kinds and description, plows, harnesses, boats and all personal property of whatsoever kind and nature, and may retain the same, or sell the same at Public Auction, either as a whole or in parcels, at public auction at such time and place as to said Fred Harrison may seem best, and in his own name or as the attorney in fact of said A. V. Gear, hereby irrevocably constituted and appointed, may execute, acknowledge and deliver all necessary bills of sale and other instruments, give good [206] and valid receipts for the purchase money and do and perform

such other acts as he may deem necessary fully to convey the same premises unto the purchaser or purchasers thereof, and otherwise to carry into effect this power of sale.

Said Fred Harrison to apply the proceeds of sale first to the costs and expenses of sale and foreclosure, together with a counsel's fee, second to the costs and expenses of seizure, possession and removal before sale, if made or taken, third, to the payment of all moneys which shall then be owing to said Fred Harrison on any and every account, whether the same shall or shall not be then due, and the remainder, if any, pay over to said A. V. Gear, his administrators or assigns.

And said A. V. Gear hereby covenants and agrees with said Fred Harrison, his administrators and assigns, as follows:

1. That he will pay to said John K. Sumner the notes herein referred to when due, and will pay to said Fred Harrison on or before the 31st day of December, A. D. 1911, all sums of money paid out by him on account of or for said endorsements.

2. That he will diligently and in a proper manner care for and harvest all crops, animals and all other property intended to be conveyed by this instrument, and will not request of said Fred Harrison any compensation or salary for so doing.

3. That he will monthly render to said Fred Harrison a statement of all receipts and expenditures on account of said premises and property intended to be conveyed by this instrument.

4. That in the event of said Fred Harrison be-

No. 814. Rec'd and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [208]

[Equity Record No. 1293, in Circuit Court, Territory of Hawaii, in re Trust Deed of John K. Sumner.]

Circuit Court, First Circuit.

IN EQUITY.

In the Matter of the Trust Deed of JOHN K. SUMNER.

To the Hon. A. S. Humphreys, First Judge of the Circuit Court, of the First Circuit:

The petition of Robert Wyllie Davis, *cestui qui* trust, respectfully *shews* to the Court that heretofore, to wit: on the 16th day of August, 1892, one John K. Sumner, then residing in Honolulu, Island of Oahu, made and executed a deed of certain land known as Mokapu, situate in the District of Koolau-poko, on the Island of Oahu, to Bruce Cartwright, upon certain trusts specified in said deed, and which enure for the use and benefit of your petitioner, which said Deed of Trust is of record in the Office of the Registrar of Conveyances in Liber 136 on page 313 et seq. That said Bruce Cartwright has resigned said office of Trustee under said deed, and wishes to be relieved of the duties incumbent on him thereunder. That the resignation of said Bruce Cartwright is filed herewith and made a part of this petition.

Wherefore your petitioner prays that a new Trustee be appointed in the place and stead of said Bruce Cartwright, to do and perform all the acts, powers

and authority that may be exercised and required under said Deed, and to that end suggests and nominates to this Honorable Court John D. Holt, Jr., as successor to the said Bruce Cartwright.

Dated, Honolulu, August 22d, 1902.

R. W. DAVIS. [209]

Island of Oahu,
City of Honolulu,—ss.

R. W. Davis, being duly sworn, deposes and says that he has read the foregoing petition, and that the contents thereof are true.

R. W. DAVIS.

Subscribed and sworn to before me this 22d day of August, A. D. 1902.

[Seal]

GEO. L. BIGELOW,
Notary Public.

[Endorsed]: E. #1293. Circuit Court, First Circuit. In Equity. In the Matter of the Trust Deed of John K. Sumner. Petition of *cestui qui* trust to appoint a new Trustee. Filed August 25, 1902. J. A. Thompson, Clerk. Cecil Brown, Attorney for Petitioner, 93 Merchant St. [210]

**[Resignation of Bruce Cartwright as Trustee of the
Deed of Trust of John K. Sumner.]**

Circuit Court, First Circuit.

IN EQUITY.

In the Matter of the Trust Deed of J. K. SUMNER.

And now comes Bruce Cartwright, Trustee, and appointed as such under that certain deed of trust made by John K. Sumner, of record in Liber 136 on

page 313, and resigns and relinquishes the offices, powers and duties of trustee thereunder.

Dated, Honolulu, August 22d, 1902.

BRUCE CARTWRIGHT,

Trustee.

[Endorsed]: E. #1293. Circuit Court, First Circuit. In Equity. In the Matter of the Trust Deed of John K. Sumner. Resignation of Trustee. Filed August 25, 1902. J. A. Thompson, Clerk. [211]

[Order Appointing New Trustee Under Deed of Trust of John K. Sumner.]

Circuit Court, First Circuit.

IN EQUITY.

In the Matter of the Trust Deed of JOHN K. SUMNER.

Upon reading and filing the petition of Robert Wyllie Davis, praying that John D. Holt, Jr., be appointed in the place and stead of Bruce Cartwright, resigned, as Trustee, of that certain deed made by John K. Sumner, dated August 16th, 1892, and of record in Liber 136 on page 313, and after hearing counsel thereon,

IT IS ORDERED, ADJUDGED AND DECREED, that John D. Holt, Jr., of Honolulu, in the Island of Oahu, and Territory of Hawaii, be and he is hereby appointed trustee of said deed above set forth, and to have and hold such office with all the power and authority as was heretofore had by the said Bruce Cartwright, resigned, by virtue of his appointment thereunder.

Dated, Honolulu, August 29, 1902.

GEO. D. GEAR,
2d Judge Circuit Court.

[Endorsed]: Circuit Court, First Circuit. In Equity. In the Matter of the Trust Deed of John K. Sumner. Order Appointing New Trustee. Filed Aug. 29/02. Frank H. Loucks, Clerk. [212]

**[Trust Deed, August 16, 1892, John K. Sumner, to
Bruce Cartwright.]**

Stamped \$1.00.

THIS INDENTURE made this 16th day of August, A. D. 1892, between JOHN K. SUMNER, of Tahiti, but at present residing in Honolulu in the Island of Oahu, the party of the first part, and BRUCE CARTWRIGHT, of said Honolulu, the party of the second part: WINESSETH: That the said party of the first part for and in consideration of the sum of ONE DOLLAR to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold and by these presents does grant, bargain and sell unto the said party of the second part that certain piece or parcel of land situate, lying and being in the District of Koolaupoko Island of Oahu, and known as MOKAPU, more particularly described as follows:

Commencing at the Hala Tree on the sea coast marked on the plan the boundary runs along that of the land of Kaneohe; North 54° 54' East 6990 Six Thousand Nine Hundred and Ninety feet; thence North 23° 45' West 1664 Sixteen Hundred and Sixty Four feet to sea coast; thence round sea coast as

shown on plan to commencement, and containing an area of 434-6/10 acres; and being the same premises conveyed to Wm. and John Sumner by deed of record in Liber 7 on pages 356 & 357.

Together with all and singular the easements tene-ments hereditaments and appurtenances thereunto belonging or in any wise appertaining and the rever-sion or reversions remainder or remainders rents issues and profits thereof, and also all the estate right title and interest thereon or thereto.

TO HAVE AND TO HOLD the same unto the said party of the second part, and his heirs, and assigns forever, but in trust nevertheless for the uses and purposes herein set forth, that is to say:

In the first place to pay the rents issues and profits arising therefrom or thereout so long as the lease now in existence is in force, to me the said party of the first part, and upon the expiration of the present lease or other sooner determination thereof to pay the rents issues and profits arising from or out of said land to my nephew Robert Wyllie Davis during the term of his natural life, [213] or in the discretion of said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes.

And in the second place from and after the death of the said Robert Wyllie Davis to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten and failing such heirs of his body, then to the wife if living of the said Robert W. Davis and failing such wife, then to convey the said premises unto the heirs at law of the said Robert W.

Davis share and share alike.

In Witness Whereof I have hereunto set my hand and seal the day and year first above written.

JOHN K. SUMNER.

In the presence of C. F. PETERSON.

Hawaiian Islands,
Island of Oahu,—ss.

On this 16th day of August, A. D. 1892, personally appeared before me, John K. Sumner, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

CHARLES F. PETERSON,
Notary Public.

Recorded and Compared this 17th day of August, A. D. 1892, at 2:11 o'clock P. M.

MALCOLM BROWN,
Deputy Registrar of Conveyances.
REGISTER OFFICE.

Honolulu, H. I., June 13th, 1902.

I hereby certify the foregoing to be a true and correct copy of an instrument on Record in this office, in Liber 136 on pages 313 and 314 of Miscellaneous Records.

THOS. G. THRUM,
Registrar of Conveyances. [214]

[Endorsed]: Number 1293. Equity Division. Circuit Court, First Circuit. In the Matter of the Trust Deed of John K. Sumner. 1902. Entered in Docket Vol. —, page —, Record Vol. — page —. J. A. Thompson, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [215]

*In the Circuit Court of the First Judicial Circuit for
the Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

(Stamped \$2.00)

FRED HARRISON,

Plaintiff,

versus

A. V. GEAR and ADDIE B. GEAR, His Wife,
Defendants.

Bill of Complaint.

To the Honorable Presiding Judge of Said Court, at
Chambers, in Equity:

Fred Harrison of the city and county of Honolulu, Territory of Hawaii, plaintiff herein, brings this his Bill of Complaint, against A. V. Gear and Addie B. Gear, his wife, both of said Honolulu, defendants herein, and alleges and charges as follows:

I.

That the defendants are both residents of said Honolulu.

II.

That on or about June 1, 1910, John D. Holt, Jr., Trustee, demised and leased to defendant A. V. Gear, for the term of twenty-five (25) years from said June

1, 1910, certain land situate in the District of Koolaulapoko, Island of Oahu, Territory of Hawaii, called and known as the land of Mokapu, containing an area of about 434.6 acres, by an indenteure in [216] writing dated June 1, 1910, and recorded in Liber 343, page 345, a copy of which said lease marked exhibit "A," is hereto attached and made a part hereof.

III.

That said lease for a valuable consideration and by sundry mesne conveyances was thereafter duly assigned to plaintiff who is now the lessee of said land of Mokapu.

IV.

That defendant, A. V. Gear, entered upon said land so leased as aforesaid, took possession thereof, and planted cotton on about thirty-five (35) acres thereof.

V.

That on November 16, 1910, plaintiff and defendant, A. V. Gear, entered into a certain agreement, a copy of which marked exhibit "B," is hereto attached and made a part hereof.

VI.

That on June 9, 1911, plaintiff and defendants, A. V. Gear and Addie B. Gear, entered into a certain agreement, a copy of which marked exhibit "C," is hereto attached and made a part hereof.

VII.

That pursuant to said agreements, plaintiff advanced to defendants, A. V. Gear and Addie B. Gear, certain sums of money for the purposes therein stated, amounting to \$7,186.07.

VIII.

That said defendants have failed and neglected to repay plaintiff said sums of money so advanced as aforesaid, save and except the sum of \$3,438.00, although demand therefor has been made, and that the sum of \$3,748.07 is now due and owing plaintiff by defendants, A. V. Gear and Addie B. Gear. [217]

IX.

That a certain amount of cotton has been taken off the aforesaid land and baled, amounting to about thirty-five (35) bales, and is now stored on said land.

X.

That under and by virtue of said agreements, plaintiff was given a first lien on said bales of cotton and growing crops of cotton on said land.

XI.

That by reason of the failure to pay said money and interest thereon as stipulated and agreed, the defendants are in default and the plaintiff, as hereinabove appears is entitled to foreclose the lien created by said exhibits and to sell the premises therein described.

Wherefore plaintiff prays:

(1). That the process of this court issue as provided by law summoning the defendants to appear and answer this complaint;

(2). That the plaintiff have judgment against the defendant A. V. Gear for the sum of \$3,748.07;

(3). That the gross amount due on said debt with interest up to the date of judgment herein be ascertained by your Honor and that the said lien be foreclosed according to law and the practice of this

Honorable Court; and that the defendants or any person whatsoever claiming by, through or under them be forever barred and foreclosed from all right, title, interest, claim, demand, or equity of redemption in and to the said mortgaged premises, so to be foreclosed, or any part thereof;

(4). That said premises be sold at auction according to law and the practice of this Honorable Court and that a [218] Commissioner be appointed by your Honor to effectuate said sale and that the plaintiff may, if he so elect, become a purchaser at said sale.

(5). That the proceeds of this sale be applied to pay:

(a). The costs of this proceeding;

(b). The expenses of said sale and a reasonable fee to the Commissioner;

(c). A reasonable fee to the plaintiff's counsel in this behalf;

(d). The principal and interest of said loan;

(e). That plaintiff may have such other and further relief as may be just and equitable and as the premises may require.

FRED HARRISON,
Plaintiff.

By WILLIAM T. RAWLINS.

Dated, Honolulu, January 20th, 1912.

[Endorsed]: Filed Jan. 20, 1912, 10 o'clock A. M.
J. A. Dominis, Clerk. [219]

Territory of Hawaii,

City and County of Honolulu,—ss.

W. T. Rawlins, being first duly sworn, on oath de-

poses and says: That he is the attorney for the plaintiff in the foregoing Bill of Complaint, and makes this affidavit for said plaintiff, by his authority and on his behalf; that he has read the said bill of complaint, knows the contents thereof and that the same is true.

WILLIAM T. RAWLINS.

Subscribed and sworn to before me this 20th day of January, A. D. 1912.

[Seal]

J. A. DOMINIS,

Clerk Circuit Court,

J. A. D. ~~Notary Public~~, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: Filed Jan. 20, 1912, 10 o'clock A. M.
J. A. Dominis, Clerk. [220]

[Exhibit "A" to Complaint—Lease Between John D. Holt, Trustee, and A. V. Gear, June 1, 1910.] ..
Stamped \$2.

This Indenture of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, Lessor, and A. V. Gear of the same place, Lessee.

Whereas, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, nevertheless, among other things, to pay the rents, issues

and profits arising from or out of said land as directed in said deed of trust.

And Whereas, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii, Now this Indenture Witnesseth:

That the said Lessor doth hereby lease and demise unto said Lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Ōahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

To Have and To Hold the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said Lessee, his executors, administrators and assigns for and during the term of Twenty-five years from the First day of June, A. D. 1910. [221]

Yielding and paying therefor rent as follows:

For the first year the rental shall be free:

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500.00) Dollars per

year, payable semi-annually in advance.

And the said lessor hereby covenants with the said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with the said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

In Witness Whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

JNO. D. HOLT,
Trustee.

A. V. GEAR.

**[Consent and Consummation of Lease by Robert
Wyllie Davis.]**

KNOW ALL MEN BY THESE PRESENTS, that I, Robert Wyllie Davis, of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future [222] under the terms of the aforementioned Deed of Trust.

ROBERT WYLLIE DAVIS.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 13th day of July, A. D. 1910, before me

personally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

**[Assignment of Lease by A. V. Gear to C. A.
Peterson, October 12, 1910.]**

Stamped \$2.

I, A. V. Gear, of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee named in the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained, do hereby assign, transfer and set over to C. A. Peterson of Honolulu, the foregoing lease, the premises thereby demised, and all right, title and interest in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with the said assignor that I will pay the

rent which may hereafter become [223] due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In Witness Whereof the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals this 12th day of October, A. D. 1910.

A. V. GEAR.

CHAS. A. PETERSON.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

[Assignment of Lease by C. A. Peterson to Addie B. Gear, October 12, 1910.]

Stamped \$2.

I, C. A. Peterson of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained do hereby assign, transfer and set over to Addie B. Gear of said Honolulu, the foregoing lease, the premises thereby demised, and all the right, title and interest which I have in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all of the covenants which are to be performed by the lessee.

In Witness Whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals this 12th day of Oct., A. D. 1910.

CHAS. A. PETERSON.

ADDIE B. GEAR. [224]

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 14th day of October, A. D. 1910, before me personally appeared A. V. Gear, Chas. A. Peterson and Addie B. Gear, to me known to be the persons described in and who executed the two foregoing instruments and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,

Notary Public, First Judicial Circuit, Territory of
Hawaii.

**[Assignment of Lease by Addie B. Gear to Fred
Harrison, October 21, 1910.]**

Stamped \$2.

I, Addie B. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar to me in hand paid, do hereby assign, transfer and set over to Fred Harrison of said Honolulu, the foregoing lease, the premises thereby demised, and all of the right, title and interest which I have

in and under the same, which is an individual half interest.

In Witness Whereof, I have hereunto set my hand and seal this 21st day of October, A. D. 1910.

ADDIE B. GEAR.

City and County of Honolulu,
Territory of Hawaii,—ss.

On this 15th day of November, A. D. 1910, before me personally appeared Addie B. Gear, to me known to be the person described in and executed the foregoing instrument, and acknowledged that she executed the same as her free act and [225] deed.

ANTONE MANUEL,

Notary Public, First Circuit, Territory of Hawaii.

Entered of record this 6th day of May, A. D. 1911, at 10:53 o'clock A. M., and compared.

CHAS. H. MERRIAM,

Registrar of Conveyances. [226]

[Exhibit "B" to Complaint—Agreement November 16, 1910, Between A. V. Gear and Fred Harrison.]

THIS INDENTURE, made this 16th day of November, A. D. 1910, by and between A. V. Gear, of Honolulu, City and County of Honolulu, Territory of Hawaii, of the first part, and Fred Harrison, of Honolulu aforesaid, party of the second part,

WITNESSETH:

THAT WHEREAS, said Fred Harrison, on the 24th day of October, A. D. 1910, did endorse those two certain promissory notes executed by A. V.

Gear on said 24th day of October, A. D. 1910, one in the sum of Seventeen Hundred and Sixty-seven Dollars and Thirty-five Cents (\$1,767.35), and payable six months from date thereof, and one in the sum of Seventeen Hundred and Sixty-seven Dollars (\$1,767.00), payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of eight per cent per annum;

AND WHEREAS, in order to partly secure said Fred Harrison said A. V. Gear is desirous and willing to convey to said Fred Harrison certain property, crops, machinery and utensils now being and situated on the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, as Lessor, and A. V. Gear as Lessee, dated June 1st, A. D. 1910;

NOW THIS INDENTURE WITNESSETH:

THAT said A. V. Gear, in consideration of the premises and the sum of One Dollar to him paid, the receipt whereof is hereby acknowledged, doth hereby assign, transfer, set over and convey unto said Fred Harrison all the right, title and interest which said A. V. Gear may have in and to the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, together with all growing [227] crops, harvested crops, machinery, tools, buildings, livestock of all kinds and description, plows, harnesses, boats and all personal property of whatsoever kind and nature.

TO HAVE AND TO HOLD unto the said Fred Harrison, his heirs, administrators and assigns, to his and their own behoof forever.

PROVIDED ALWAYS that if said A. V. Gear shall pay to said John K. Sumner those two certain promissory notes executed by A. V. Gear on the 24th day of October, A. D. 1910, one in the sum of \$1,767.35, and payable six months after date thereof, and one in the sum of \$1,767.00, and payable in twelve months from the date thereof, both payable to the order of said John K. Sumner, and shall further reimburse said Fred Harrison, before the 31st day of December, A. D. 1911, for all sums of money paid out on account of or by reason of said endorsements, and shall observe and perform all of the covenants herein contained and on the part of said A. V. Gear to be performed, then these presents shall be void. But upon failure of said A. V. Gear to reimburse said Fred Harrison on or before the 31st day of December, A. D. 1911, for all moneys paid out by said Fred Harrison by reason of said endorsements, or upon the breach by A. V. Gear of any condition herein contained, then said Fred Harrison is hereby expressly authorized and empowered to take possession of said land of Mokapu and all growing crops, harvested crops, machinery, tools, buildings, livestock of all kinds and description, plows, harnesses, boats and all personal property of whatsoever kind and nature, and may retain the same, or sell the same at Public Auction, either as a whole or in par-

cels, at public auction at such time and place as to said Fred Harrison may seem best, and in his own name or as the attorney in fact of said A. V. Gear [228] hereby irrevocably constituted and appointed, may execute, acknowledge and deliver all necessary bills of sale and other instruments, give good and valid receipts for the purchase money and do and perform such other acts as he may deem necessary fully to convey the same premises unto the purchaser or purchasers thereof, and otherwise to carry into effect this power of sale.

Said Fred Harrison to apply the proceeds of sale first to the costs and expenses of sale and foreclosure, together with a counsel's fee, second to the costs and expenses of seizure, possession and removal before sale, if made or taken, third, to the payment of all moneys which shall then be owing to said Fred Harrison on any and every account, whether the same shall or shall not be then due, and the remainder, if any, pay over to said A. V. Gear, his administrators or assigns.

And said A. V. Gear hereby covenants and agrees with said Fred Harrison, his administrators and assigns, as follows:

1. That he will pay to said John K. Sumner the notes herein referred to when due, and will pay to said Fred Harrison on or before the 31st day of December, A. D. 1911, all sums of money paid out by him on account of or for said endorsements.

2. That he will diligently and in a proper manner care for and harvest all crops, animals and all

other property intended to be conveyed by this instrument, and will not request of said Fred Harrison any compensation or salary for so doing.

3. That he will monthly render to said Fred Harrison a statement of all receipts and expenditures on account of said premises and property intended to be conveyed by this instrument. [229]

4. That in the event of said Fred Harrison becoming dissatisfied with the manner in which said A. V. Gear is conducting or managing the business of said land of Mokapu, that he, said A. V. Gear, will pass over to said Fred Harrison the control of said business and all property intended to be conveyed by this instrument, with full power in said Fred Harrison to carry on said business until such time as said promissory notes, herein referred to, are paid, and said Fred Harrison is fully reimbursed for all amounts paid out on account of said endorsements, and for the conduct of said business.

IN WITNESS WHEREOF, said A. V. Gear has hereunto set his hand and seal the day and year first above written.

(Signed) A. V. GEAR.

City and County of Honolulu,
Territory of Hawaii,—ss.

On this 16th day of November, A. D. 1910, before me personally appeared A. V. Gear, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he exe-

cuted the same as his free act and deed.

(Signed) ANTONE MANUEL,
Notary Public, First Circuit, Territory of Hawaii.
[230]

**[Exhibit "C" to Complaint—Agreement Between
A. V. Gear and Addie B. Gear, et al., June 9,
1911.]**

THIS AGREEMENT made and entered into this ninth day of June, A. D. 1911, by and between A. V. Gear, of Honolulu, and ADDIE B. GEAR, his wife, parties hereto of the first part, and hereinafter called the parties of the first part, and FRED HARRISON, of the same place, party hereto of the second part:

WHEREAS, there has been planted upon the land known as and called "Mokapu," Island of Oahu (as described in deed recorded in Liber 136, page 313 of the Registry of Conveyances), about thirty-five (35) acres of cotton, and which said crop is now growing upon said thirty-five (35) acres, which said thirty-five (35) acres is held under lease by Fred Harrison by virtue of several mesne assignments; and WHEREAS the said A. V. GEAR and ADDIE B. GEAR, his wife, are the owners of said crops; and WHEREAS, the said FRED HARRISON has advanced to the said A. V. GEAR the sum of Three Hundred Dollars (\$300.00) in and about the cultivation of the said cotton crop so growing as aforesaid, and has also paid the sum of Thirteen Hundred Eighty-eighty and 10/100 (\$1,388.10) Dollars in addition thereto, which said money is now due and

owing from the said A. V. Gear to the said FRED HARRISON; and WHEREAS the said FRED HARRISON is about to advance the further sum of Two Hundred (\$200.00) Dollars to pay interest upon a certain promissory note which is now due and unpaid and which said note was made and executed by Robert Wyllie Davis in favor of John K. Sumner for a balance due of Twenty-three Hundred Four and 48/100 (\$2,304.48) Dollars; and WHEREAS, the said FRED HARRISON has further obligated himself to pay for and on behalf of said A. V. GEAR to John K. Sumner the sum [231] of Seventeen Hundred Sixty-seven (\$1,767.00) Dollars and interest thereon at the rate of eight (8%) per cent per annum; and WHEREAS the said A. V. GEAR and ADDIE B. GEAR, his wife, and the said FRED HARRISON are defendants in the suit in equity which is now pending in the Circuit Court of the First Judicial Circuit between John K. Sumner, Plaintiff, and Robert Wyllie Davis, Mark K. Davis, his wife, John D. Holt, Jr., A. V. Gear and Addie B. Gear, his wife, and Fred Harrison Respondents (Equity 1768), for the foreclosure of a mortgage deed of said lands given to secure the payment of the said note; and WHEREAS it is necessary in order to preserve the rights of the parties to this agreement that said interest and costs shall be forthwith paid; and WHEREAS the said FRED HARRISON is about to advance, and does hereby promise and agree to advance, such further sums of money in conjunction with Jordan & Company as will be

necessary to take off the said cotton crops now growing upon said land as hereinbefore set out, and such sum of money as may be absolutely necessary to pick said cotton, prepare it for baling, and to bale and deliver it to said Jordan & Company, or to such other firm or person as the said FRED HARRISON may conclude:

NOW THEREFORE, the said A. V. GEAR and ADDIE B. GEAR, his wife, do hereby absolutely sell, assign, transfer and create a first lien in and upon said crops of cotton and the said cotton when the same shall be baled to the said FRED HARRISON, his executors, administrators and assigns, and the said FRED HARRISON shall have full power to collect the money, the proceeds of the sale of the said cotton, or any part thereof, from time to time when the same shall be delivered, and he, the said FRED HARRISON, shall have [232] absolute control of the funds and proceeds arising from the sale of the said cotton when delivered, and shall have full control of the crops and the cotton from this time forward.

AND IT IS HEREBY FURTHER AGREED that from the proceeds of the sale of the said cotton, the said FRED HARRISON shall retain the said sum of Thirty-eight Hundred (\$3,800.00) Dollars, and interest, being money advanced for the cultivation of said cotton and preparing the same for market, together with the other moneys already advanced as above set forth, and also all other sums to be advanced for and on account of the said A. V. GEAR and ADDIE B. GEAR, his wife.

IT IS HEREBY EXPRESSLY UNDERSTOOD AND AGREED, and it is the intent and meaning of this agreement, that the said FRED HARRISON shall have absolute control over the said crop of cotton, the preparing of the same for market, the delivery thereof and the proceeds therefrom, and no person or persons shall have any power or authority to interfere with the said FRED HARRISON in the cultivation, preparing for market, delivery of said cotton and collecting the proceeds from the sale thereof.

And the said A. V. GEAR does hereby further promise and agree that he will render all possible assistance to the said FRED HARRISON in taking charge of the cultivation of the said cotton, in preparing the same for market, and, under the direction of the said FRED HARRISON, said A. V. GEAR does hereby covenant, promise and agree to render such assistance at all times when requested by the said FRED HARRISON so to do.

It is hereby further agreed that from and out of any sum of money in excess of the said sum of Thirty-eight Hundred (\$3,800.00) Dollars, arising from the proceeds of the [233] sale of the said cotton and any future advances to be made by the said FRED HARRISON, the surplus, if any, after deducting said sum of Thirty-eight Hundred (\$3,800.00) Dollars and interest, and all other advances, shall be paid to the said ADDIE B. GEAR upon her personal receipt therefor, and which said FRED HARRISON agrees to pay to the said

ADDIE B. GEAR personally upon her personal receipt therefor.

It is hereby further agreed that this agreement shall not in any manner vary or alter the terms of that certain agreement made by and between ADDIE B. GEAR and FRED HARRISON, dated October 24, 1910, and that certain agreement made by and between A. V. GEAR and FRED HARRISON, dated November 16, 1910, concerning the said land of Mokapu and the crops to be raised thereon.

IN WITNESS WHEREOF, the said parties of the first part and the said party of the second part have hereunto and to another instrument of like tenor and date set their hands and seals the day and year first above written.

(Signed) A. V. GEAR. (Seal)

(Signed) ADDIE B. GEAR (Seal)

(Signed) FRED HARRISON. (Seal)

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 10th day of June, A. D. 1911, before me personally appeared A. V. Gear and Addie B. Gear, his wife, and Fred Harrison, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Signed) CHARLES F. PETERSON,

Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: Filed Jan. 20, 1912, 10 o'clock A. M.
J. A. Dominis, Clerk. [234]

*In the Circuit Court of the First Circuit, Territory of
Hawaii.*

AT CHAMBERS.

FRED HARRISON,

Plaintiff,

vs.

A. V. GEAR and ADDIE B. GEAR, His Wife,
Defendants.

Chambers Summons.

(Stamped \$2.)

The Territory of Hawaii, to the High Sheriff of
the Territory of Hawaii, or his Deputy; the
Sheriff of the City and County of Honolulu, or
his Deputy:

YOU ARE COMMANDED to summon A. G. Gear
and Addie B. Gear his wife, to appear ten days after
service hereof, if they reside in the City and County
of Honolulu otherwise twenty days after service, be-
fore such Judge of the Circuit Court of the First
Circuit as shall be sitting at Chambers in the Court
Room of said Judge, in the Judiciary Building, in
Honolulu, to answer the annexed Bill of Complaint
of Fred Harrison.

AND YOU ARE FURTHER COMMANDED, by
order of the Honorable Presiding Judge of the Cir-
cuit Court of the First Circuit. And have you then
there this Writ with full return of your proceedings
thereon.

WITNESS the Honorable the presiding Judge of the Circuit Court of the First Circuit, at Honolulu, aforesaid this 20th day of January, 1912.

[Seal]

J. A. DOMINIS,

Clerk. [235]

Territory of Hawaii,

City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii do hereby certify and make return that I served the within Summons, Bill of Complaint and Exhibits "A," "B" and "C" as follows:

On A. V. Gear, therein named as defendant, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 22d day of January, A. D. 1912, by delivering to him a certified copy hereof of the Bill of Complaint and Exhibits "A," "B" and "C" annexed hereto and at the same time showing him the original as herein directed. Dated Honolulu, city and county of Honolulu, Territory of Hawaii this 22d day of January, A. D. 1912.

WM. HENRY,

High Sheriff, Territory of Hawaii.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, Patrick Gleason, Deputy High Sheriff of the Territory of Hawaii do hereby certify and make re-

Section 1769 Revised Laws. The time within which an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

turn that I served the within Summons, Bill of Complaint and Exhibits "A," "B" and "C" as follows:

On Addie B. Gear, therein named as defendant, at Honolulu, city and county of Honolulu, Territory of Hawaii this 22d day of January, A. D. 1912, by delivering to her a certified copy hereof and of the Bill of Complaint and Exhibits "A," "B" and "C" annexed hereto and at the same time showing her the original as herein directed.

Dated Honolulu, City and County of Honolulu, Territory of Hawaii this 22d day of January, A. D. 1912.

PATRICK GLEASON,
Deputy High Sheriff, Territory of Hawaii.

[Endorsed]: E. No. 1814. Reg. 2, Pg. 63. Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. Chamber Summons. Issued at 10:05 o'clock A. M., Jan. 20th, 1912. J. A. Dominis, Clerk. Returned at 10:35 o'clock A. M., Jan. 23d, 1912. J. A. Dominis, Clerk.

[In pencil:] 28/181 Pau.

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

AT CHAMBERS—IN EQUITY.
FRED HARRISON

vs.

A. V. GEAR and ADDIE B. GEAR.

Answer of A. V. Gear, Defendant.

BILL TO FORECLOSE LIEN, ETC. EQ. #1814.

This defendant, now and at all times hereafter, sav-

ing and reserving unto himself all benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties, and other imperfections in the plaintiff's said bill of complaint for answer thereto, or unto so much and such parts as this defendant is advised is or are material to be answered unto, this defendant for answering says:

1. He admits the truth of the allegations contained in paragraphs I, II, III, in so far as it applies to one-half of said premises, IV, V, VI, and X of said complaint.

2. He denies the truth of the allegations as contained in paragraphs VII, VIII, IX and XI of said complaint.

3. In further answering the matters contained in paragraphs VII he alleges the truth to be that the said advances made by plaintiff on account of said premises and property and the business and transactions referred to were made solely to and on behalf of this defendant and not on behalf of the defendant Addie B. Gear, and that said defendant Addie B. Gear is in no way liable, either personally or otherwise, for any of such payments and advances.

4. In further answering the matters contained in paragraph VIII he alleges the truth to be that plaintiff has not paid [236] nor made any advances to or on behalf of the defendant Addie B. Gear nor is she in any way indebted for the same, but that all payments and advances made under said documents and agreements were made for and on behalf of this defendant only.

5. In further answering the matters contained in

paragraph XI of said complaint he alleges the truth to be that by reason of the failure of said plaintiff to be reimbursed the sums so advanced by him in connection with said property and business and the transactions referred to in said documents and agreements, this defendant is in default, and this defendant admits that by reason of the premises said plaintiff is entitled to foreclose his lien created by said documents and agreements and is entitled to sell said premises as provided in said agreements, and this defendant is willing and hereby consents that a decree may be entered herein directing that said lien be foreclosed and that said premises be sold as provided in said agreements and that he as well as defendant Addie B. Gear be forever barred and foreclosed from all right title and interest claim demand or equity of redemption in and to said property which he or she has acquired and transferred to plaintiff under said leases and agreements.

Wherefore this defendant submits himself to such orders and decrees in the premises as shall be meet and proper.

Dated Honolulu, January 29, 1912.

A. V. GEAR,

C. F. PETERSON,

Attorney for Defendant.

Oath waived.

WILLIAM T. RAWLINS,

Attorney for Plaintiff.

Copy hereof received.

WILLIAM T. RAWLINS,

Atty. for Plaintiff.

[Endorsed]: Eq. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. Answer of A. V. Gear. Filed Feb. 2, 1912, 1:25 P. M. J. A. Dominis, Clerk. [237]

In the Circuit Court of the First Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.
FRED HARRISON

vs.

A. V. GEAR and ADDIE B. GEAR.

Answer of Addie B. Gear, Defendant.

BILL TO FORECLOSE LIEN, ETC., EQ. No. 1814.

This defendant, now and at all times hereafter, saving and reserving unto herself all benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties, and other imperfections in the plaintiff's said bill of complaint for answer thereto, or unto so much and such parts as this defendant is advised is or are material to be answered unto, this defendant for answering says:

1. She admits the truth of the allegations contained in paragraphs I, II, III in so far as it applies to one-half of said premises, IV, V, VI and X of said complaint.

2. She denies the truth of the allegations contained in paragraphs VII, VIII, IX and XI of said complaint.

3. In further answering the matters contained in

paragraph VII she alleges the truth to be that whatever advances were made by plaintiff on account of said premises and property and the business referred to were made solely to and on behalf of A. V. Gear, defendant, and not on behalf of this defendant, and that this defendant is in no way liable, either personally or otherwise, for any of such payments and advances.

4. In further answering the matters contained in paragraph VIII she alleges the truth to be that plaintiff has not paid nor made any advances to or on behalf of this defendant nor is this defendant in any way indebted to plaintiff for the same.

5. In further answering the matters contained in paragraph [238] XI of said complaint she alleges the truth to be that by reason of the failure of said plaintiff to be reimbursed the sums so advanced by him in connection with said property and business under the documents and agreements referred to this defendant is in default in so far as she has any right to claim said premises, and this defendant admits that by reason of the premises said plaintiff is entitled to foreclose his lien created by said agreements and leases and is entitled to sell said premises as provided in said agreements, and this defendant is willing and hereby consents that a decree may be entered herein directing that said lien be foreclosed and that said premises be sold and that she be forever barred and foreclosed from all right, title and interest, claim, demand or equity of redemption in and to said property which she has acquired and transferred to plaintiff under said lease and agreements, but that said

decree be entered without costs being taxed against this defendant.

Wherefore this defendant prays she may be hence dismissed with her costs herein.

Dated Honolulu, January 29, 1912.

ADDIE B. GEAR.

C. F. PETERSON,

Attorney for Defendant.

Oath waived.

WILLIAM T. RAWLINS,

Attorney for Plaintiff.

Copy hereof received.

WILLIAM T. RAWLINS,

Atty. for Plaintiff.

[Endorsed]: Eq. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. Answer of Addie B. Gear. Filed Feb. 2, 1912, 1:25 P. M. J. A. Dominis, Clerk. [239]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

AT CHAMBERS—IN EQUITY.

FRED HARRISON

vs.

A. V. GEAR and ADDIE B. GEAR, His Wife.

**Special Appearance and Motion to Quash Summons
and Service Thereof.**

BILL TO FORECLOSE LIEN.

Now comes C. F. Peterson, and appearing specially

on behalf of A. V. Gear and Addie B. Gear, the defendants above named, and not submitting said defendants to the jurisdiction of this court, but appearing specially for the purpose of raising the question of such jurisdiction and of this motion, and not otherwise, moves this Honorable Court that the summons and service thereof in this cause upon the said defendants be quashed and set aside and declared void on the ground that this Honorable Court has no jurisdiction in or over the above-entitled cause nor of the defendants, for the reason that the process issued in this cause has not been issued as required by law, and more particularly as required by Section 1839 of the Revised Laws of Hawaii.

This motion is based upon all of the records and papers in said cause and upon the testimony to be adduced at the hearing of this motion.

Dated Honolulu, February 1, 1912.

A. V. GEAR and
ADDIE B. GEAR,
By C. F. PETERSON,
Their Attorney. [240]

Notice of Motion.

To Fred Harrison, Esq., and W. T. Rawlins, Esq.,
His Attorney:

Dear Sirs:

Please take notice that the foregoing motion will be presented to the Presiding Judge of said court at his chambers in the courthouse in Honolulu on Monday, February 5, 1912, at 9:30 o'clock A. M., or as

soon thereafter as counsel may be heard.

C. F. PETERSON,

Attorney for Defendants.

[Endorsed]: E. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit. In Equity. Fred Harrison vs. A. V. Gear, etc. Bill to Foreclose Lien. Motion to Quash. Filed at 4:35 P. M., Feby. 1, 1912. Henry Smith, Clerk. C. F. Peterson, Attorney for Defendants. [241]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

FRED HARRISON,

Plaintiff,

VS

A. V. GEAR and ADDIE B. GEAR, His Wife,
Defendants.

Motion for Decree of Foreclosure.

BILL TO FORECLOSE MORTGAGE AND LIEN.

Now comes Fred Harrison, plaintiff herein, and moves this Honorable Court that it make and enter its decree in favor of said Fred Harrison and against A. V. Gear and Addie B. Gear, his wife, defendants in said cause, substantially in the manner and form as set forth in the form of Decree of Foreclosure hereto annexed and made a part of this motion.

Said motion is made upon the ground that under the pleadings in said cause all and singular the material allegations set forth and contained in the plain-

tiff's Bill of Complaint on file in said cause stand admitted to be true by said defendants.

This motion is based upon the pleadings, papers, records and files in said cause, reference whereto is hereby made and the same made part hereof.

Honolulu, February 5th, 1912.

FRED HARRISON,
Plaintiff,
By WILLIAM T. RAWLINS,
His Attorney. [242]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

FRED HARRISON,
Plaintiff,
vs
A. V. GEAR and ADDIE B. GEAR, His Wife,
Defendants.

Decree of Foreclosure.

Upon the motion of Fred Harrison by his attorney, William T. Rawlins, for the entry of a Decree of Foreclosure in the above-entitled cause in favor of said Fred Harrison: It appearing to this Court that the above-named defendants A. V. Gear and Addie B. Gear have filed their several answers to the Bill of Complaint in said cause wherein and whereby said defendants admit the allegations and matters as in said several answers contained. And it also appearing to this Court upon said complaint and said answers thereto that all and singular the allegations

in said Bill of Complaint set forth which are admitted by said answers are true and that said Fred Harrison plaintiff is justly entitled to the relief by him in said Bill of Complaint prayed as admitted by said answers.

I.

That there is now due and owing from said defendant A. V. Gear to said Fred Harrison upon the mortgage and agreements sued upon in this action the sum of Three Thousand Seven [243] Hundred Forty-eight and 7/100 (\$3,748.07) Dollars, together with interest thereon at the rate of eight (8%) per cent per annum from the 20th day of January, 1912.

II.

That said Addie B. Gear by her written answer to said Bill of Complaint consents that a decree may be entered in this cause that the lien of said Fred Harrison created by the mortgage leases and agreements sued upon in this cause be foreclosed and that said premises be sold and that she be forever barred and foreclosed from all right, title and interest, claim or demand or equity of redemption in and to said property which she has acquired and transferred to said Fred Harrison under said mortgage, leases and agreements.

III.

That each and all the terms and conditions of said mortgage and agreements have been broken by said defendant A. V. Gear, defendant herein, and that said Fred Harrison, plaintiff herein, is entitled to have said mortgage and agreements foreclosed and the property hereinafter set forth and described sold

in the manner prescribed by law, and the proceeds arising from said sale applied to and upon the payment of said sum of money so due as aforesaid:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that all and singular the property set forth in said mortgage and agreements and hereafter more particularly described be sold at public auction at the front door of the Circuit Court Building, Honolulu, city and county of Honolulu, Territory of Hawaii, upon the terms hereinafter set forth:

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that [244] Job Batchelor, Esq., be and he is hereby appointed a Commissioner to sell the property hereinafter set forth, that before entering upon his duties as such Commissioner he take the oath and give a bond in the sum of Five Hundred (\$500) Dollars for the faithful discharge of his duties as such Commissioner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that whatever sum or sums of money may be derived by said Commissioner as aforesaid from the sale of said property hereinafter described and set forth, shall be by said Commissioner held subject to the order of this court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the mortgaged premises hereinafter mentioned or described or so much thereof as shall be necessary to raise the amount due to the complainant herein and the costs of this suit and expenses of sale be sold at public auction by Job Batchelor, Esq., Commissioner herein, upon notice of the same

being given by said Commissioner by publication in the "Hawaiian Star," a newspaper of general circulation printed and published in Honolulu, city and county of Honolulu, Territory of Hawaii aforesaid, for at least three times a week for two weeks from the date of the first publication thereof, and that the purchaser or purchasers at said sale pay to said Commissioner upon the fall of the hammer ten (10%) per cent of the price bid, the balance to be paid upon the delivery of bill of sale and conveyances by the said Commissioner.

That said Commissioner may adjourn said sale from time to time upon giving such notice as to him may seem reasonable of such adjournment, and may make said sale at the time and place to which the same shall be adjourned.

That said Commissioner upon the sale of the property herein set forth and described shall make his report to this Court with all convenient speed, and upon the report being made [245] to the Court of his proceedings herein, and upon the confirmation thereof, he is authorized and empowered to execute a bill of sale to the purchaser or purchasers thereof free and clear of all incumbrances or lien thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Job Batchelor, Commissioner herein, out of the proceeds of said sale, retain his fees as such Commissioner and the costs and expenses of said sale, and pay to Henry Smith, Esq., Clerk of the Circuit Court, any sum found to be due as costs of court and pay to plaintiff's counsel the sum of One Hundred Eighty-five Dollars as counsel

fee, and pay over to said Fred Harrison the sum of Three Thousand Seven Hundred Forty-eight and 7/100 (\$3,748.07) Dollars, together with interest thereon at the rate of eight (8%) per cent per annum from the 20th day of January, A. D. 1912, and any overplus after payment of said Three Thousand Seven Hundred Forty-eight and 7/100 (\$3,748.07) Dollars, together with interest thereon, shall be held by said Job Batchelor, Commissioner, subject to the order of this court:

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants A. V. Gear and Addie B. Gear, and all persons claiming or to claim from and under them and each of them, and all persons having liens or claims or a lien or claim subsequent to the said mortgages and agreements, by judgment or decree upon the property hereinafter described, and their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives and all persons claiming to have acquired any share or interest in said property be and they are hereby forever barred and foreclosed of and from all claim, right, title, interest, lien, incumbrance and equity of redemption in and to the property set forth and described in said mortgages and agreements and hereinafter set forth and [246] described and every part and parcel thereof from and after the date hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff herein, Fred Harrison, may become a purchaser at said sale of said

Commissioner, and that the purchaser or purchasers of said property set forth in said mortgage and agreements be let into and given immediate possession thereof, and that all of the parties to this action who may be in possession of said lands and property or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the Commissioner's deed for said premises and property or any part thereof.

The premises and property described to be sold under this decree are:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

AND IT IS FURTHER ORDERED AND DECREED that plaintiff recover and have from defendant A. V. Gear his costs in this cause expended.

DONE in open Court this 6th day of February,
A. D. 1912.

HENRY E. COOPER,
First Judge of the Circuit Court of the First Judicial
Circuit, Territory of Hawaii.

O. K.—C. F. PETERSON,
Attorney for Defendants. [247]

[Endorsed]: E. No. 1814. Reg. 2, pg. 63. Circuit Court, First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Fred Harrison, Plaintiff, vs. A. V. Gear and Addie B. Gear, His Wife, Defendants. Motion for Decree and Decree of Foreclosure. Filed Feb. 5, 1912, 3:40 P. M. J. A. Dominis, Clerk. [248]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

IN EQUITY—AT CHAMBERS.

No. 1814.

FRED HARRISON,

vs.

A. V. GEAR and ADDIE GEAR, His Wife.

Return and Account of Sale by the Commissioners.

**BILL TO FORECLOSE MORTGAGE AND
LIEN.**

To the Honorable HENRY E. COOPER, First
Judge of the Above-entitled Court, Presiding at
Chambers:

The undersigned Job Batchelor, of Honolulu, city

and county of Honolulu, Territory of Hawaii, a Commissioner duly appointed by the Decree of Foreclosure of this Honorable Court, duly given and made in the above-entitled cause on the 6th day of February, A. D. 1912, respectfully makes and files return and account of sale made by him pursuant to said Decree of Foreclosure and Lien, directing him to sell at public auction the property in said Decree of Foreclosure and Lien and hereafter more particularly described, and report said sale to this Court, to wit:

That the undersigned, as such Commissioner, and pursuant to said Decree of Foreclosure and Lien, caused public notice of said sale to be given by publication in the "Hawaiian Star," a newspaper of general circulation printed, published and circulated in Honolulu, city and county of Honolulu, Territory of Hawaii, for at least three (3) times a week for two (2) weeks, to wit: On February 8, 12, 15, 17, 19, 21 and 23, 1912, which [249] said notice did specify a day and time and place on which and at which said property would be sold and said sale would be had and on which said notice the property advertised to be sold was described with common certainty, to wit, a true as well as a popular description of said property, as hereinafter more particularly described; all of which will be more fully and at large appear by and from the "Affidavit of Publication" hereunto annexed marked Commissioner's Exhibit "A" and made a part hereof.

That the undersigned, as such Commissioner, caused to be posted up in prominent places in said

Honolulu and vicinity and on the property advertised to be sold notices of the time and place of sale; in which said notices the property advertised to be sold was described with common certainty, to wit, a true as well as a popular description of said property, as hereinafter more particularly described, as will more fully and at large appear by and from a copy of said notices (or posters) hereunto annexed, marked Commissioner's Exhibit "2" and made a part hereof.

That on Saturday, the 24th day of February, A. D. 1912, at 12 o'clock noon of said day, at the front entrance of the Circuit Court in the Y. M. C. A. Building on Hotel Street, Honolulu, city and county of Honolulu, Territory of Hawaii, the same being the place designated and set forth in said notices so published and posted as aforesaid, the undersigned, as Commissioner, offered to read the Decree of Foreclosure and Lien heretofore entered herein, and also caused to be read the Commissioner's notice of sale.

That the undersigned, as such Commissioner, thereupon offered for sale all that undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated [250] June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton, one mule, one boat, chickens, ducks, turkeys, cotton gin, press

and baler, tools, farming implements and cotton seed now on said premises.

That prior to the crying of the sale, the Commissioner caused to be read the Commissioner's notice of sale and the Decree of Foreclosure and Lien heretofore entered herein.

That the undersigned, as such Commissioner, engaged and employed James F. Morgan, Esq., a duly licensed auctioneer, who cried and announced said sale and assisted the undersigned, as such commissioner, in carrying on and in making and in conducting said sale.

That in pursuance of said Decree of Foreclosure and Lien and the Commissioner's Notice of Sale the said land and premises hereinbefore described were sold as one piece.

That at such sale the undersigned, as such Commissioner, sold to Cecil Brown, Trustee, who became the purchaser of the property so offered for sale and sold as aforesaid for the price and sum of Three Thousand Seven Hundred (\$3,700) Dollars, and the said purchaser was the highest and best bidder, and the sum and amount above specified and set forth was the highest and best bid for the property so offered for sale and sold as aforesaid.

That the undersigned is informed and believes, and so states the facts to be, that the sum bid and the amount realized at said sale is not disproportionate to the value of the property as aforesaid.

That said sale was fairly and honestly conducted.
[251]

That the following is a full, true and particular

account of said sale, together with the amount realized thereat and the expenses thereto, to wit:

RECEIPTS:

Amount realized from sale of property	\$3,700.00
--	------------

EXPENDITURES:

“Hawaiian Star” advertising, etc.	38.95	
W. T. Rawlins, attorney’s fee	185.00	
J. F. Morgan, auctioneer.....	50.00	
Automobile hire	31.00	
Job Batchelor, Commissioner...	75.00	
Court Costs	22.00	401.95
		<hr/>
		\$3,298.05

That the Decree of Foreclosure and Lien of this Honorable Court has in all respects been fully complied with.

WHEREFORE, the undersigned, as such Commissioner, respectfully prays the order and decree of this Court that said sale be approved and confirmed, and the undersigned, as such Commissioner, be authorized, empowered and directed to make, execute and deliver to the purchaser at said sale a good and sufficient deed of conveyance of said property so purchased as aforesaid, and that a reasonable sum and amount be fixed and ordered paid to the undersigned for and in compensation for his services as such Commissioner, and that thereupon he be relieved and discharged of and from any and all further liability

or obligation as such Commissioner, and that his bond be cancelled.

Dated, Honolulu, February 27th, 1912.

JOB BATCHELOR,
Commissioner. [252]

[Commissioner's Exhibit "A"—Affidavit of Publication.]

(Form for Hearing.)

*In the Circuit Court of the First Circuit, Territory of
Hawaii.*

AT CHAMBERS.

In the Matter of FRED HARRISON vs. A. V.
GEAR and ADDIE B. GEAR.

Affidavit of Publication.

Territory of Hawaii, City,
and County of Honolulu,—ss.

Jas. T. Carey, being duly sworn, deposes and says,

~~Manager~~

that he is ~~Foreman~~ Clerk
of the Hawaiian Star News-

paper Assn. Ltd. publishers of the "HAWAIIAN STAR," a newspaper published in the City and County of Honolulu Territory of Hawaii; that the ordered publication in the above-entitled matter of which the annexed is a true and correct printed notice was published seven times in the "Hawaiian Star," aforesaid, commencing on the 7th day of February 1912, and ending on the 23d day of February 1912 (both days inclusive), to wit, on Feb. 8, 12, 15, 17, 19,

21, 23, and that affiant is not a party to or in any way interested in the above entitled matter.

JAS. T. CAREY.

Subscribed and sworn to before me this 24th day of Feb., A. D. 1912.

[Seal]

J. A. DOMINIS,

Clerk Circuit Court of the First Circuit.

COMMISSIONER'S SALE of
VALUABLE LEASEHOLD, ETC.

Situated at Mokapu, Island of Oahu, Territory of Hawaii.

Pursuant to a Decree of Foreclosure made by the Honorable Henry E. Cooper, First Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, at Chambers, in Equity, on the 6th day of February, A. D. 1912, in a suit in Equity, No. 1814, entitled, "Fred Harrison, plaintiff, vs. A. V. Gear and Addie B. Gear, His Wife, Defendants: Bill to Foreclose Mortgage and Lien," (Equity Division, No. 1814), the undersigned, as Commissioner, duly appointed and constituted as such by said Decree of Foreclosure, will sell, at Public Auction, to the highest and best bidder for cash, subject to confirmation by the Court, on SATURDAY, the 24th DAY OF FEBRUARY, A. D. 1912, at 12 o'clock noon of said day, at the front (mauka) door of the Circuit Court Building, Honolulu, City and County of Honolulu, Territory of Hawaii, the following described premises and property:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V.

Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

TERMS OF SALE: Cash in United States Gold Coin; ten per cent. (10%) of the purchase price to be paid on the fall of the hammer; balance upon confirmation of sale by the Court and execution and delivery of deed by the Commissioner.

Deed to be at expense of purchaser.

For further particulars apply to Mr. W. T. Rawlins, attorney for plaintiff, at his office, Judd Building, Honolulu, or to the undersigned.

JOB BATCHELOR,

Commissioner.

Dated Honolulu, T. H. February 8, 1912.

7ts, Feb. 8, 12, 15, 17, 19, 21, 23, 1912.

[Endorsed]: Equity 1814. Circuit Court, First Circuit. In the Matter of Fred Harrison vs. A. V. Gear & Addie B. Gear. Affidavit of Publication. (As to a Hearing.) Filed at 9:25 o'clock A. M. On Feb. 24, 1912. J. A. Dominis, Clerk. Commissioner's Exhibit "A." Filed February 26th, 1912. Job Batchelor Commissioner. [253]

[Commissioner's Exhibit No. 2—Notice of Sale.]**COMMISSIONER'S SALE of
VALUABLE LEASEHOLD, ETC.**

Situate at Mokapu, Island of Oahu, Territory of
Hawaii.

Pursuant to a Decree of Foreclosure made by the Honorable Henry E. Cooper, First Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, at Chambers, in Equity, on the 6th day of February, A. D. 1912, in a suit in Equity, No. 1814, entitled, "Fred Harrison, plaintiff, vs. A. V. Gear and Addie B. Gear, his wife, defendants: Bill to Foreclose Mortgage and Lien," (Equity Division No. 1814), the undersigned, as Commissioner, duly appointed and constituted as such by said Decree of Foreclosure, will sell, at Public Auction, to the highest and best bidder for cash, subject to confirmation by the Court, on Saturday, the 24th day of February, A. D. 1912, at 12 o'clock noon of said day, at the front (Mauka) door of the Circuit Court Building, Honolulu, City and County of Honolulu, Territory of Hawaii, the following described premises and property:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

TERMS OF SALE: Cash in United States Gold Coin; ten per cent (10%) of the purchase price to be paid on the fall of the hammer; balance upon confirmation of sale by the Court and execution and delivery of deed by the Commissioner.

Deed to be at expense of purchaser.

For further particulars apply to Mr. W. T. Rawlins, attorney for plaintiff at his office, Judd Building, Honolulu, or to the undersigned.

JOB BATCHELOR,
Commissioner.

Dated Honolulu, T. H. February 8, 1912.

[Endorsed]: Equity 1814. Fred Harrison vs. A. V. Gear and Addie B. Gear. Commissioner's Exhibit "2." Filed February 26/12. Job Batchelor, Commissioner. [254]

**[Receipt, February 26, 1912, William T. Rawlins to
Job Batchelor, etc.]**

Honolulu, February 26th, 1912.

Received from Job Batchelor, Commissioner, One Hundred Eighty-five no/100 Dollars, being attorney's fee allowed by Court in Equity Matter 1814 (Fred Harrison v. A. V. Gear et al.).

WILLIAM T. RAWLINS.

\$185. [255]

**[Receipt, February 27, 1912, of Job Batchelor,
Commissioner.]**

Honolulu, T. H. February 27, 1912.

Received—from Seventy-five 00/100 Dollars, Commissioner's Fee allowed by Court in Equity suit No. 1814, Fred Harrison vs. A. V. Gear et al.

JOB BATCHELOR,
Commissioner.

\$75.00/100. [256]

[Bill of Hawaiian Star Newspaper Association.]

No. 2365.

E. No. 2165.

Honolulu, T. H., Feb. 12, 1912—191.

M JOB BATCHELOR,

In Account with The Hawaiian Star Newspaper Association, Limited.

Printers and Publishers. Daily and Semi-weekly.

8. To Commissioner's Sale Fred

Harrison vs. A. V. Gear,

11½" 7ts. 37 95

12. " 25 Slips for same. 1 00 38 95

Hawaiian Star Newspaper Assn.

PAID

Feb. 29, 1912.

By Jas. T. Carey.

**COMMISSIONER'S SALE OF VALUABLE
LEASEHOLD, ETC.**

Situate at Mokapu, Island of Oahu, Territory of
Hawaii.

Pursuant to a Decree of Foreclosure made by the

Honorable Henry E. Cooper, First Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, at Chambers, in Equity, on the 6th day of February, A. D. 1912, in a suit in Equity No. 1814, entitled "Fred Harrison, plaintiff, v. A. V. Gear and Addie B. Gear, his wife, defendants: Bill to Foreclose Mortgage and Lien," (Equity Division No. 1814), the undersigned, as Commissioner, duly appointed and constituted as such by said Decree of Foreclosure, will sell, at Public Auction, to the highest and best bidder for cash, subject to confirmation by the Court, on Saturday, the 24th day of February, A. D. 1912, at 12 o'clock Noon of said day, at the front (Mauka) door of the Circuit Court Building, Honolulu, City and County of Honolulu, Territory of Hawaii, the following described premises and property:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

TERMS OF SALE: Cash in United States Gold Coin; ten per cent (10%) of the purchase price to

be paid on the fall of the hammer; balance upon confirmation of sale by the Court and execution and delivery of deed by the Commissioner.

Deed to be at expense of purchaser.

For further particulars apply to Mr. W. T. Rawlins, attorney for plaintiff, at his office, Judd Building, Honolulu, or to the undersigned.

JOB BATCHELOR,

Commissioner.

Dated: Honolulu, T. H., February 8, 1912.

7ts. Feb. 8, 12, 15, 17, 19, 21, 23, 1912. [257]

[Bill of James F. Morgan, Auctioneer, February 26, 1912.]

Cable Address "MORGANA."

Honolulu, T. H., Feb. 26, 1912.

W. T. Rawlins, Atty.,

To James F. Morgan, Dr.

Real Estate Broker and Auctioneer.

Stocks and Bonds.

Telephone 1572

857 Kaahumanu Street.

Postoffice Box 594

To auctioneer's services, re sale of Mokapu

leasehold, sold on Feb. 24, 1912, to Cecil

Brown, Trustee, for \$3700.00..... 50.00

(Equity #1814)

Received payment, Feb. 26, 1912.

JAS. F. MORGAN.

E. L. SCHWARZBERGER. [258]

**[Statement of Costs in Harrison vs. Gear et ux. in
Circuit Court.]**

	Stamps	5.00
	Sums and service.....	5.
	3 Exhibits	75
	Service	2 50
	Ans.50
	Mo. to Quash.....	1.25
	Mo. and Decree.....	2.50
	2 Exh.	50
Docket 28/181.	Affid.....	50
	Return	50
	a/c	50
	Confirm	1 25
	Bond	1 25
		<hr/>
		22.00

Paid in as a deposit

Jan. 20/12.

HENRY SMITH,

Clerk, etc.

Court Costs.

Feb. 29/12.

[Endorsed]: Equity 1814. Rg. 2/63. Circuit Court, First Circuit. Fred Harrison v. A. V. Gear and Addie B. Gear, His Wife. Commissioner's Return of Sale. Filed February 27th, 1912, 1:05 P. M. Job Batchelor, Clerk. [259]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

IN EQUITY—No. 1814—AT CHAMBERS.

FRED HARRISON,

Plaintiff,

vs.

A. V. GEAR and ADDIE B. GEAR, His Wife,
Defendants.

Order Confirming Sale.

BILL TO FORECLOSE MORTGAGE AND LIEN.

This matter coming on regularly to be heard this 27th day of February, A. D. 1912, and it appearing from proofs adduced to the satisfaction of the Court that notice of this hearing had been duly served upon said A. V. Gear and Addie B. Gear, defendants herein, and on C. F. Peterson, Esq., their attorney;

And it further appearing that heretofore on the 27th day of February, 1912, Job Batchelor, the Commissioner appointed by a decree of this Court, made the 6th day of February, 1912, to sell the mortgaged property involved in this suit, did file and enter herein a certain return and account of sale wherein and whereby he did report the sale on February 24th, 1912, to Cecil Brown, Trustee, of all the property in said decree described as follows:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber

343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii. [260]

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

And it appearing to the satisfaction of the Court upon proofs adduced that said sale was legally made and fairly conducted; that the sum bid for the said property sold was not disproportionate to the value of the property sold, and that no exceptions have been filed or objections made to said Commissioner's report of sale, or to the confirmation of said sale, and no good reason appearing why said sale should not be confirmed, and that said decree of foreclosure and sale has in all respects been complied with by said Commissioner; and it further appearing that the amount due to the complainant herein up to the date of said sale, to wit, February 24th, 1912, is the sum of \$3,773.07, and that the net proceeds of said sale after deducting all costs and expenses of sale and advertising, attorneys fees and Commissioner's fee is the sum of \$3,798.05.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the return and account of sale by the Commissioner be and the same is in all respects ratified, approved and confirmed.

2. That in accordance with the decree of Febru-

ary 6, 1912, the sale of the property hereinbefore described to Cecil Brown, Trustee, for the sum of Three Thousand Seven Hundred (\$3,700) Dollars be and the same is hereby ratified, approved and confirmed, and the said Commissioner is hereby ordered and directed to make a good and sufficient conveyance thereof to the said Cecil Brown, Trustee.

3. That the said Job Batchelor be and he is allowed the sum of \$75 in full compensation for his services as said Commissioner.

4. That out of the sum of \$3,700, the total receipts from the property so sold, the said Commissioner do pay

(a) To William T. Rawlins the sum of \$185 as an attorney's fee. [261]

(b) To Job Batchelor the sum of \$75 as Commissioner's fee.

(c) The costs and expenses of Court incurred in this foreclosure proceeding by plaintiff amounting to \$22.

(d) The expenses of sale, to wit, \$88.95.

(e) That the Commissioner do pay to Fred Harrison the sum of \$3,298.05, being the balance of the proceeds of said sale now in his hands.

5. That upon the Commissioner making such payments and filing herein proper receipts therefor he be discharged from further duty or responsibility as such Commissioner and his bond filed herein be cancelled.

Dated Honolulu, February 28th, 1912.

HENRY E. COOPER,

First Judge, First Circuit Court, Territory of
Hawaii.

[Endorsed]: Equity 1814. Rg. 2/63. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Equity. At Chambers. Fred Harrison, Plaintiff, vs. A. V. Gear and Addie B. Gear, His Wife, Defendants. Order Confirming Sale. Filed February 29th, 1912, 11:45 A. M. Job Batchelor, Clerk. [262]

[Endorsed]: Number 1814, Equity Division Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. 1912. Foreclose Mortgage and Lien. Entered in Docket 28, page 181, Record —, Page —. J. A. Dominis, Clerk. No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk. No. 814. Rec'd and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [263]

Sheriff's Return to Writ of Possession.

HIGH SHERIFF'S RETURN.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii, do hereby certify and make return that on the 15th day of May, A. D. 1912, in obedience to the command herein contained and set forth in the

within Writ at Mokapu, District of Koolaupoko, in said County and Territory, I did execute the said Writ in the manner as follows, that is to say, by then and there placing Cecil Brown, trustee named in the within writ, through Fred Harrison, his agent, in the complete and absolute possession of the premises and personal property hereinbelow set forth and described.

An undivided one-half interest of Addie B. Gear and A. V. Gear in and to the property described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii; thirty-five acres of growing cotton; about twenty-seven bales of cotton; 1 mule; 1 boat; chickens; ducks; turkeys; cotton gin; press and bales; tools, farming implements and cotton seeds found on said premises in said Writ described and by excluding, removing and expelling from said premises all persons claiming in opposition to them.

I therefore return this Writ as fully satisfied this 16th day of May, A. D. 1912.

Witness my hand and seal this 16th day of May, A. D. 1912.

[Seal]

WM. HENRY,
High Sheriff, Territory of Hawaii. [264]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS.—IN EQUITY. (\$2.00 Stamps.)

FRED HARRISON,

Plaintiff,

versus

A. V. GEAR and ADDIE B. GEAR, His Wife,
Defendants.

**Writ of Possession [in Harrison vs. Gear et ux. in
Circuit Court].**

Territory of Hawaii, to the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy:

WHEREAS, on the 6th day of February, 1912, the plaintiff above named secured a Decree of Foreclosure of Mortgage and Lien in the above-entitled court and cause, decreeing that all and singular the property hereinafter set forth and described be sold at public auction according to law and the practice of this Honorable Court and in the manner prescribed by said Decree of Foreclosure aforesaid, to wit, the following property:

An undivided one-half interest of Addie B. Gear and A. V. Gear in and to the property described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and bales, tools, farming implements and cotton and seed now on said premises;

WHEREAS, on the 24th day of February, 1912, the Commissioner appointed by said Court in said decree of foreclosure effected said sale of said property according to the terms of said decree, [265] as more fully appears from the Order Confirming Sale filed in the above-entitled cause on the 28th day of February, 1912, and sold all and singular the said property to Cecil Brown, Trustee; and

WHEREAS, said sale was duly confirmed and approved as appears from said Order Confirming Sale, and it appearing to the Court from the files and records herein that all matters and things necessary and proper to be done in connection with said foreclosure proceedings have been done and performed, and that said Cecil Brown, Trustee, the purchaser under said Commissioner's sale as aforesaid, is entitled to the possession of said property;

NOW, THEREFORE, you are commanded to cause, without delay, the said Cecil Brown, Trustee, or his agent, to have possession of the said property.

Done at Chambers in Honolulu, this 24th day of April, A. D. 1912.

HENRY E. COOPER,
First Judge, First Judicial Circuit, Territory of
Hawaii.

[Seal]

Attest: HENRY SMITH,
Clerk.

[Endorsed]: E. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison, Plaintiff, vs. A. V. Gear et al., Defendants. Writ of Possession. Filed Apr. 24, 1912, 1:55 P. M. and issued. J. A. Dominis, Clerk. Returned 11:15 A. M., May 17th, 1912. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [266]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS.—IN EQUITY. (\$2.00 Stamps.)
CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

Bill of Complaint.

PARTITION.

To the Honorable Presiding Judge of the First Circuit, in Equity, at Chambers:

The Bill of Complaint of Cecil Brown, Trustee, of the city and county of Honolulu, Territory of Hawaii, plaintiff herein, respectfully alleges and shows as follows:

I.

That Robert Wyllie Davis, defendant herein, resides in said city and county of Honolulu.

II.

That on June 1, 1910, John D. Holt, Jr., Trustee, the owner and possessor of certain land hereinafter

described did, by an instrument in writing duly recorded in the office of the Registrar of Conveyances in Honolulu, in Liber 343, pages 347-351, demise and lease to one A. V. Gear, a certain piece of land called and known as Mokapu, situate in said city and county of Honolulu, for a term of 25 years from said June 1, 1910, as will more fully appear by copy of said lease attached hereto, marked "A" and made a part hereof. [267]

III.

That thereafter by sundry mesne conveyances and for a valuable consideration an undivided one-half of said lease was duly conveyed to plaintiff.

IV.

That thereafter by sundry mesne conveyances and for a valuable consideration one undivided half of said lease was duly conveyed to said defendant, Robert Wyllie Davis.

V.

That plaintiff is now the owner of one undivided half of said lease and defendant is the owner of the other undivided half of said lease.

VI.

That plaintiff and defendant are now in the possession of the lands demised by said lease.

VII.

That plaintiff is desirous of having his interest in said lease partitioned and set apart to him in severalty.

WHEREFORE, plaintiff prays that defendant may be by the process of this court cited to be and

appear in this court at a time to be specified therein and a full and true answer make of the matters in this Bill of Complaint contained; that he may be bound by all Orders and Decrees that may be made herein; that he may be required to set up any claim or claims that he may have in or to said lease; that a Commissioner may be appointed by this Court to examine and report whether or not said leasehold interest in said lands is capable of being partitioned without great prejudice to the parties interested herein; that in case said leasehold [268] is capable of being so partitioned the interest of said plaintiff herein be set off to him in severalty, otherwise that said leasehold interests in said land be sold and the proceeds of sale divided between the plaintiff and defendant according to their respective interests therein, and for costs and such other and further relief as may be just.

Dated, Honolulu, May 27, 1912.

CECIL BROWN,
Trustee.

THOMPSON, WILDER, WATSON &
LYMER,

A. A. W.,
Attorneys for Plaintiff.

Let process issue herein as prayed for returnable in ten (10) days after service.

HENRY E. COOPER,
First Judge, First Circuit Court, Presiding in
Equity, at Chambers.

Territory of Hawaii,
City and County of Honolulu,—ss.

Cecil Brown, Trustee, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled suit; that he has read the foregoing Bill of Complaint and that the contents thereof are true.

CECIL BROWN,
Trustee.

Subscribed and sworn to before me this 27th day of May, A. D. 1912. .

[Seal] F. F. FERNANDES,
Notary Public, First Judicial Circuit, Territory of Hawaii. [269]

[Exhibit "A" to Bill of Complaint—Lease, June 1, 1910, Between John D. Holt, Trustee, and A. V. Gear.]

Stamped \$2.

This Indenture of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee,

Whereas, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, never-

theless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust.

And whereas, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii, now this Indenture witnesseth:

That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

To have and to hold the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said lessee, his executors, administrators and assigns, for and during the term of twenty-five years from the first day of June, A. D. 1910. [270]

Yielding and praying therefor rent as follows:

For the first year the rental shall be free.

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at

the rate of Five Hundred (\$500.00) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenants with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date interchangeably set their hands and seals the day and year first above written.

JNO. D. HOLT,
Trustee.

A. V. GEAR.

[Exhibit "A" to Bill of Complaint—Consent and Confirmation of Lease by Robert Wyllie Davis.]

KNOW ALL MEN BY THESE PRESENTS, that I, Robert Wyllie Davis of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms [271] of the aforementioned Deed of Trust.

ROBERT WYLLIE DAVIS.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me person-

ally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

**[Exhibit "A" to Bill of Complaint—Assignment of
Lease by A. V. Gear to C. A. Peterson, October
12, 1910.]**

Stamped \$2.

I, A. V. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee named in the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained, do hereby assign, transfer and set over to C. A. Peterson of said Honolulu, the foregoing lease, the premises thereby demised, and all right, title and interest in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with

the said assignor that I will pay the rent which may hereafter [272] become due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof the parties hereto have hereunto and to another instrument in duplicate
W. S. of like tenor and date, interchangeably set
their hands and seals this 12th day of Oct.,
A. D. 1910.

A. V. GEAR.

CHAS. A. PETERSON.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

**[Exhibit "A" to Bill of Complaint—Assignment of
Lease by C. A. Peterson to Addie B. Gear,
October 12, 1910.]**

Stamped \$2.

I, C. A. Peterson of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained do hereby assign, transfer and set over to Addie B. Gear of said Honolulu, the foregoing lease, the premises thereby demised, and all the right, title and interest which I have in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all

of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate
W. S. of like tenor and date, interchangeably set
their hands and seals this 12th day of [273]
Oct., A. D. 1910.

CHAS. A. PETERSON.

ADDIE B. GEAR.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 14th day of October, 1910, before me personally appeared A. V. Gear, Chas. A. Peterson and Addie B. Gear, to me known to be the persons described in and who executed the two foregoing instruments and acknowledged that they executed the same as their free act and deed.

[Seal] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

**[Exhibit "A" to Bill of Complaint—Assignment of
Lease by Addie B. Gear to Fred Harrison,
October 21, 1910.]**

Stamped \$2.

I, Addie B. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar to me in hand paid, do hereby assign, transfer

and set over to Fred Harrison of said Honolulu, the foregoing lease, the premises thereby demised, and all of the right, title and interest which I have in and under the same, which is an undivided half interest.

In witness whereof I have hereunto set my hand and seal this 21st day of October, A. D. 1910.

ADDIE B. GEAR.

City and County of Honolulu,
Territory of Hawaii,—ss.

On this 15th day of November, [274] A. D. 1910, before me personally appeared Addie B. Gear, to me known to be the person described in and executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

[Seal]

ANTONE MANUEL,

Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of record this 6th day of May, A. D. 1911,
at 10:53 o'clock A. M., and compared.

CHAS. H. MERRIAM,

Registrar of Conveyances.

[Endorsed]: Filed May 27, 1912, at 11:15 o'clock
A. M. J. A. Dominis, Clerk. [275]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

AT CHAMBERS.

(\$2.00 Stamps)

CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

**Chamber Summons [in Brown, Trustee, vs. Davis,
in Circuit Court, Territory of Hawaii].**

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy.

YOU ARE COMMANDED to summon Robert Wyllie Davis, to appear ten days after service hereof, if he resides in the City and County of Honolulu, otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the courtroom at Honolulu, to answer the annexed Bill of Complaint of Cecil Brown, Trustee.

AND YOU ARE FURTHER COMMANDED, by order of the Honorable ———, Judge of the Circuit Court of the ——— Circuit.

And have you then there this Writ with full return of your proceedings thereon.

Witness the Honorable HENRY E. COOPER, First Judge of the Circuit Court of the 1st Circuit, at Honolulu, this 27th day of May, 1912.

[Seal]

J. A. DOMINIS,
Clerk.

Section 1769 Revised Laws. The time within which an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of

Hawaii, do hereby certify and make return that I served the within Summons and Bill of Complaint as follows:

On Robert Wyllie Davis, therein named as defendant, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 28th day of May, A. D. 1912, by delivering to him a certified copy hereof and of the Bill of Complaint annexed hereto and at the same time showing him the original as herein directed.

Dated Honolulu, City and County of Honolulu, Territory of Hawaii, this 28th day of May, A. D. 1912.

WM. HENRY,
High Sheriff, Territory of Hawaii.

[Endorsed]: E. No. 1828, Reg. 2, Pg. 77. Circuit Court, First Circuit. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Chamber Summons. Issued at 11:15 o'clock A. M., May 27th, 1912. J. A. Dominis, Clerk. Returned at 2:55 o'clock P. M., May 29th, 1912. J. A. Dominis, Clerk.

[In pencil:] Pau. [276]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: E. No. 1828.

Judiciary Dept.

Jun. 21, 1912.

Territory of Hawaii.

CECIL BROWN, Trustee,

Complainant,

vs.

ROBERT WYLLIE DAVIS,

Respondent.

**Stipulation [That Respondent have to June 20, 1912,
to Appear, Plead, etc., to Bill of Complaint].**

It is hereby stipulated between the parties hereto by their respective solicitors, that the respondent Robert Wyllie Davis have and he is hereby allowed to and including the 15th day of June, A. D. 1912, within which to appear, plead, demur to or answer the bill of complaint of complainant herein.

**THOMPSON, WILDER, WATSON &
LYMER,**

F. E. T.,

Solicitors for Complainant.

E. C. PETERS,

Solicitor for Respondent.

**[Order Allowing Respondent to June 15, 1912, to
Appear, Plead, etc., to Bill of Complaint.]**

ORDER ALLOWING FURTHER TIME.

Pursuant to the foregoing stipulation, it is hereby

ordered that the respondent above named have and he is hereby allowed to and including the 15th day of June, A. D. 1912, within which to appear, plead, demur to or answer the bill of complaint herein.

HENRY E. COOPER,

1st Judge Presiding at Chambers.

Honolulu, June 21st, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. E. No. 1828. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., vs. Robert Wyllie Davis. 1st Stipulation. Filed at 10:45 A. M., June 21, 1912. Henry Smith, Clerk. By W. B. Lymer. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Respondent. [277]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: E. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Stipulation [Extending Time to June 20, 1912, to
Appear, Plead, etc., to Bill of Complaint].**

It is hereby stipulated by and between the parties hereto that the respondent above named have and he is hereby allowed to and including the 20th day of

June, A. D. 1912, within which to appear, plead, demur to or answer the bill of complaint of plaintiff herein.

THOMPSON, WILDER, WATSON &
LYMER,
A. A. W.,

Attorneys for Plaintiff.

E. C. PETERS,
Attorney for Defendant.

Approved.

HENRY E. COOPER,
Judge.

Honolulu, T. H., June 15th, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. E. No. 1828. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., vs. Robert Wyllie Davis. Judiciary Dept., Territory of Hawaii. Jun. 22, 1912. 2d Stipulation. Filed by E. C. P. Filed Jun. 17, 1912, 3:05 o'clock P. M. J. A. Dominis, Clerk. E. C. Peters, 210-211, McCandless Building, Honolulu, T. H., Attorney for Defendant. [278]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.
PARTITION.

CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

Motion for Judgment and Decree Pro Confesso.

Now comes Cecil Brown, Trustee, by the undersigned, his attorneys, and moves this Honorable Court for judgment and Decree *pro confesso* in the above-entitled suit on the ground that no answer, demurrer or other plea has been filed or entered therein within the time allowed by law and by the agreement of the parties thereto, and that the said Robert Wyllie Davis is in default.

All the papers, pleadings, the record of the clerk herein, and the affidavits of Henry Smith, Esq., and F. E. Thompson, Esq., are referred to and made a part of this motion.

CECIL BROWN,

Trustee.

By THOMPSON, WILDER, WATSON &
LYMER,
W. B. L.

Dated at Honolulu, this 21st day of June, A. D.
1912. [279]

Territory of Hawaii,

City and County of Honolulu,—ss.

F. E. Thompson, being duly sworn, on oath deposes and says, that he is a member of the firm of Thompson, Wilder, Watson & Lymer, attorneys for Cecil Brown, trustee, plaintiff in the foregoing suit in partition in which Robert Wyllie Davis is the defendant (respondent); that no answer, demurrer or other pleading has been served upon said firm of Thompson, Wilder, Watson & Lymer within the time al-

lowed by law and by the agreement of the parties, and that the said Robert Wyllie Davis is, by reason of his failure to appear and answer, demur or otherwise plead in default.

F. E. THOMPSON.

Subscribed and sworn to before me this 21st day of June, A. D. 1912.

[Seal]

J. R. KENNY,

Notary Public in and for Circuit Court, First Judicial Circuit. [280]

Territory of Hawaii,

City and County of Honolulu,—ss.

Henry Smith, being duly sworn, on oath deposes and says that he is clerk of the Circuit
 H. S. Court of the First Circuit Territory of Hawaii; that he has examined the files and records of the Circuit Court of the First Judicial Circuit, and particularly the files and record in that certain suit in equity numbered 1828 and entitled Cecil Brown, Trustee, vs. Robert Wyllie Davis, and that no answer, demurrer, plea or appearance has been filed or entered therein on the part of said Robert
 H. S. Wyllie Davis, defendant (respondent) therein, since the institution of said suit on the 27th day of May, A. D. 1912.

HENRY SMITH.

Subscribed and sworn to before me this 21st day of June, A. D. 1912.

JOB BATCHELOR,

Clerk Cir. Court.

H. S. ~~Notary Public~~ First Judicial Circuit, Territory of Hawaii.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Motion and Affidavits. Filed at 11 A. M. June 21, 1912. Henry Smith, Clerk. Thompson, Wilder Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Cecil Brown, Tr. [281]

**[Order that Original Bill of Brown, Trustee, be
Taken Pro Confesso Against Davis.]**

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

PARTITION.

CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

This cause came on to be heard this day upon a motion of the plaintiff to take the bill *pro confesso* as against Robert Wyllie Davis, defendant (respondent), Messrs. Thompson, Wilder, Watson & Lymer appearing for the motions, and upon hearing said motion and all matters in the premises, it appearing that the said defendant Robert Wyllie Davis has not filed his plea, answer, or demurrer in said cause within the time allowed by law and is in default for want of such plea, answer or demurrer,

IT IS ORDERED that the original bill of Cecil Brown, Trustee, be taken *pro confesso* against said Robert Wyllie Davis, defendant.

Done at Chambers this 21st day of June, A. D. 1912.

HENRY E. COOPER,

Judge of the Above-entitled Court.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Decree. Filed at 11 A. M. June 21, 1912. Henry Smith, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block Honolulu, Attorneys for Cecil Brown, Tr. [282]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Demurrer.

Comes now the defendant above named and demurs to the bill of complaint of complainant herein, and for ground of demurrer alleges:

1. That the bill of complaint herein does not state facts sufficient to entitle complainant to the relief as in and by said bill of complaint prayed for, or any relief.

WHEREFORE this respondent prays that the bill of complaint herein be dismissed and he go hence

with his costs herein incurred.

E. C. PETERS,
Attorney for Defendant.

Honolulu, June 21, 1912.

Certificate of Merits.

This is to certify that the foregoing demurrer is not interposed for purposes of delay.

E. C. PETERS,
Attorney for Defendant.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77 Eq. No. 1828. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., v. Robert Wyllie Davis. Demurrer. Filed at 5:30 P. M. June 21st, 1912. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [283]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Joinder in Demurrer.

Comes now the plaintiff above named by Messrs. Thompson, Wilder, Watson & Lymer, and joining in the demurrer heretofore filed by the plaintiff above

named on the 21st of June, 1912, in the above-entitled action, says that the Bill of Complaint heretofore filed herein, does state facts sufficient to entitle him, said plaintiff, to the relief as in and by said Bill of Complaint prayed for, and such facts your plaintiff is willing to aver and maintain.

CECIL BROWN,
Trustee.

By THOMPSON, WILDER, WATSON &
LYMER,

W. B. L.,

His Attorneys.

Honolulu, June 26, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant. Joinder in Demurrer. Filed Jun. 26, 1912, 2:55 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [284]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Answer of Robert Wyllie Davis.

To the Honorable the Presiding Judge at Chambers,
in Equity, of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

Comes now Robert Wyllie Davis, respondent above named, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering admits, alleges and denies as follows, to wit:

1. Admits that this respondent resides in the City and County of Honolulu.

2. Denies that on June 1, A. D. 1910, or at any other time or at all, John D. Holt, Jr., Trustee, was the owner and/or possessor of certain land in said bill of complaint called and known as "Mokapu."

Denies that on said last-named day or at any other time or at all, said John D. Holt, Jr., as Trustee or otherwise, or as the owner and/or the possessor of otherwise, of certain land in said bill of complaint called and known as "Mokapu," did by [285] an instrument in writing or otherwise, or at all, demise and/or lease to one A. V. Gear a certain piece of land called and known as "Mokapu" for a term of twenty-five years from said June 1, A. D. 1910, or for any other term or at all.

And by way of further answer to paragraph two of said bill of complaint, this respondent alleges and

avers that heretofore and on, to wit, the 16th day of August, A. D. 1892, one John K. Sumner, for a good and valuable consideration, by indenture of deed of even date, of record in the office of the Registrar of Conveyances of the Territory of Hawaii at Honolulu, in Liber 136, at page 313, did grant, bargain and sell unto one Bruce Cartwright, his heirs and assigns forever, said piece or parcel of land called and known as "Mokapu," in trust for certain uses and purposes in said deed of trust enumerated, described and set forth, among other things, "to pay the rents, issues and profits arising from or out of said land to" the respondent "Robert Wyllie Davis during the term of his natural life, or in the discretion of said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes." That pursuant to said trust deed, with the permission of the grantee therein named, this respondent on said last-named day went into possession of said premises to reside thereon and use the same for grazing and agricultural purposes, and ever since has been in possession thereof and residing thereon and using the same for grazing and agricultural purposes.

That thereafter and on, to wit, the 29th day of August, A. D. 1902, the said Bruce Cartwright having resigned his said trust under the said deed of trust aforesaid, one John D. Holt was by a Judge of the Circuit Court of the First Judicial Circuit appointed and substituted to act as trustee under said deed of trust in the place and stead of the said Bruce Cartwright, and the said John D. Holt, Jr., thereupon

and thereafter [286] pretended to act as the successor in trust of the said Bruce Cartwright under said deed of trust. But this respondent is advised and believes and upon such advice and belief alleges that the said Judge of said First Circuit Court was without jurisdiction of the person and/or the subject matter of said trust, and without power and/or authority to appoint the said John D. Holt, Jr., as trustee under said deed in the place and stead of and as substitute of the said Bruce Cartwright, and the pretended order or decree appointing the said John D. Holt, Jr., as trustee under said deed of trust, was null and void, in this, that on said 16th day of August, A. D. 1892, this respondent became and was possessed of life estate in and to the said lands and premises known as "Mokapu" freed and discharged from any and all trusts, and the said John D. Holt, Jr., never nor at all has been the owner of the legal title of said premises under said deed of trust from John K. Sumner to Bruce Cartwright, Trustee aforesaid.

That thereafter and on, to wit, the 1st day of June, A. D. 1910, said John D. Holt, Jr., pretending to act as trustee under said deed of trust from John K. Sumner to Bruce Cartwright and as the pretended successor in trust thereunder of the said Bruce Cartwright, without authority or consent of this respondent, but mutually conspiring with one A. V. Gear to cheat and defraud this respondent and deprive this respondent of said premises and the use and possession thereof, made and executed to said A. V. Gear a pretended lease of said premises known as "Mokapu" for the term of twenty-five years from the

1st day of June, A. D. 1910, a copy of which is appended to plaintiff's bill of complaint as exhibit "A," said premises on said 1st day of June, A. D. 1910, being reasonably worth an annual rental of \$1,500.

That thereafter and on, to wit, the — day of June, A. D. 1912, the said A. V. Gear falsely representing and pretending [287] to this respondent that it was for the best interest of this respondent that this respondent consent to said lease and ratify and confirm the same, secured from this respondent his alleged written consent, ratification and confirmation thereto, a copy of which is appended to plaintiff's bill of complaint as a part of exhibit "A," but said ratification, consent and confirmation was without consideration and void.

And this respondent is advised and upon such advice alleges that said pretended lease from the said John D. Holt, Jr., Trustee, to the said A. V. Gear, is and was null and void and of no force and/or effect, but that if the same be of legal force and effect, that the term thereof in equity and good conscience should be reformed by this Honorable Court in this, that said lease contain the usual covenants of an agricultural lease including a covenant against waste and the right of re-entry by the lessor in the event of the failure by the lessee to pay the rent reserved and obey and conform to the covenants and agreements in the lease on the part of the lessee to be kept and performed, and the rent reserved be the sum of \$1,500 per annum for each and every year during the term denied.

3. Denies that thereafter and by sundry mesne

conveyances or otherwise, or at all, and for a valuable or any consideration, an undivided one-half or any interest of and in said lease was duly and/or at all conveyed to plaintiff.

And by way of further answer to the allegations of paragraph three of said bill of complaint contained, this respondent alleges and avers that heretofore and on, to wit, the 1st day of January, A. D. 1907, this respondent, Robert W. Davis, for a good and valuable consideration did grant, bargain, sell and convey to the said John K. Sumner an undivided one-half share or interest in and to the land and premises known as "Mokapu," and ever since said last-named day said John K. Sumner has been and [288] now is the owner and holder thereof, subject to a defeasance of the legal title in the said John K. Sumner and the reconveyance thereof by him to this respondent at any time on or before January 2d, A. D. 1916, upon the payment to the said John K. Sumner of the sum of \$2,794.93, with interest from the 1st day of January, A. D. 1906, to the date of reconveyance at the rate of seven per cent per annum, and thereafter and on, to wit, the 2d day of January, A. D. 1906, this respondent conveyed by way of mortgage to the said John K. Sumner and undivided one-half share and interest in and to said land and premises known as "Mokapu," and said mortgage is in full force and effect and not satisfied or discharged.

That heretofore and on, to wit, the 12th day of October, A. D. 1910, said A. V. Gear did execute a certain indenture of assignment wherein and whereby he did pretend to assign unto one C. A. Peterson the

said pretended lease to him from said John D. Holt, Jr., aforesaid, and the said Chas. A. Peterson thereafter and on the day and year aforesaid by a certain indenture of assignment attempted to assign all the right, title and interest of him, said Chas. A. Peterson, in and to said lease, to Addie B. Gear, the wife of said A. V. Gear; but this respondent is informed and believes and upon such information and belief alleges it to be the fact that both the said Chas. A. Peterson and the said Addie B. Gear, at the time of the alleged assignment of said lease to him and her respectively, well knew all the matters and things herein alleged of and concerning said lease and premises as alleged herein, and took the same with full knowledge thereof, and this affiant is further informed and believes and so deposes, the said Addie B. Gear was not the real party in interest, but that she, the said Addie B. Gear, took the said pretended lease as the trustee for the said A. V. Gear. [289]

That thereafter and on, to wit, the 21st day of October, A. D. 1910, and on the 9th day of June, A. D. 1911, the said Addie B. Gear did assign said lease by way of mortgage to one Fred Harrison, but the said Fred Harrison took said alleged assignment with full knowledge of all the matters and things herein alleged of and concerning said lease and said premises known as "Mokapu" hereinbefore alleged, and this respondent is informed and believes that this plaintiff is the trustee of the said Fred Harrison, and as such trustee upon foreclosure of said mortgage to the said Fred Harrison did purchase said pretended lease for and on behalf of the said Fred Harrison with full knowl-

edge of all the matters and things hereinbefore alleged of and concerning said lease and said premises known as "Mokapu," and that said complainant, as trustee, claims the undivided one-half interest in and to said lease from the said John D. Holt under and by virtue of such foreclosure of mortgage; but this respondent is advised and upon such advice alleges that said complainant is not the owner of an undivided one-half interest in and to said lease, nor is the owner of any interest in and to the said premises and land known as "Mokapu," and that this court is without jurisdiction to try and determine in equity the alleged title of said complainant in and to the said premises known as "Mokapu," but complainant should and must proceed at law to try his title thereto.

4. Denies that thereafter by sundry mesne conveyances and/or for a valuable or other consideration one undivided half of said lease was duly or at all conveyed to this respondent.

And by way of further answer to the allegations of paragraph four of said bill of complaint contained this respondent alleges that on, to wit, the 16th day of October, A. D. 1911, the said A. V. Gear, pretending to act as the lessee under said pretended lease to him from the said John D. Holt, pretended to [290] lease and demise to this respondent an undivided one-half share or interest in and to said lease, but this respondent is advised and upon such advice alleges that he acquired no interest under said assignment and is not the owner or holder of any interest in "Mokapu" under and by virtue of said lease.

5. Denies that plaintiff is now the owner of an undivided one-half of the said lease.

6. Denies that the plaintiff is in the possession of said lands called and known as "Mokapu."

WHEREFORE, this respondent prays the judgment of this Honorable Court that the within action be abated and that plaintiff be left to the trial and determination of his alleged claim in and to the lands known as "Mokapu" to proceedings of law to establish or determine the same; or, in the alternative, that this Honorable Court decree that the lease from John D. Holt to A. V. Gear is null and void and of no force and/or effect; or, in the alternative, should this court hold that said lease to the said A. V. Gear is a good, valid and subsisting lease, that the said lease be decreed to be subject to the assignment of a one-half interest therein in this respondent and be reformed to contain the usual covenants of an agricultural lease including a covenant against waste and right of re-entry by the lessor in the event of the failure by the lessee to observe and perform the covenants and agreements thereof on his part to be kept and performed, and that said lease be further reformed in respect to the reserved rental to the extent of reserving a rental thereunder of the sum of \$1,500 per annum, and that this respondent have such other and further relief in the premises as to this court may seem proper.

And this respondent will ever pray.

ROBERT W. DAVIS. [291]

City and County of Honolulu,
Territory of Hawaii,—ss.

Robert W. Davis, being first duly sworn, on oath deposes and says: That he is the respondent in the foregoing action named; that he has read the foregoing answer and knows the contents thereof and that the same is true, except as to those matters and things alleged upon information, advice or belief, and as to those matters so alleged that he believes them to be true.

ROBERT W. DAVIS.

Subscribed and sworn to before me this 24th day of July, A. D. 1912.

[Seal]

E. C. PETERS,

Notary Public 1st Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Service of the Within Answer of Robert Wyllie Davis is Hereby Admitted this 24th Day of July, A. D. 1912. F. E. Thompson, Attorneys for Plaintiff. Eq. No. 1828. Reg. 2/77 Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Answer. Filed Jul. 24, 1912, 3:45 o'clock P. M. J. A. Dominis, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [292]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

versus

ROBERT WYLLIE DAVIS,

Defendant.

**The Replication of Cecil Brown, Trustee, Plaintiff,
to the Answer of Robert Wyllie Davis.**

This repliant saving and reserving unto himself all and all manner of advantage and exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto says that he does and will aver, maintain and prove his said bill to be true, certain and sufficient in law and that the answer is uncertain, evasive and insufficient in law to be replied unto by this repliant, without this, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto, confessed or avoided, traversed or otherwise, is true; all of which matters this repliant is ready to aver, maintain and prove as this Honorable Court

shall direct and humbly pray as in and by said bill he has already prayed.

CECIL BROWN, Trustee,
Plaintiff,
By THOMPSON, WILDER, WATSON &
LYMER,

A. A. W.,
His Attorneys.

Honolulu, July 25, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant. The Replication of Cecil Brown, Trustee, Plaintiff, to the Answer of Robert Wyllie Davis. Filed at 9:35 A. M. July 26, 1912. Henry Smith, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [293]

*Circuit Court, First Judicial Circuit, Territory of
Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION.

CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

Motion [to Said Cause].

Now comes Cecil Brown, Trustee plaintiff in the above-entitled suit by his attorneys, Thompson,

Wilder, Watson & Lymer, and moves this Honorable Court that said suit be set for trial.

This motion is based on the record herein and on all the pleadings and papers on file herein.

Dated Honolulu, July 26, 1912.

CECIL BROWN, TRUSTEE,
Plaintiff.

By THOMPSON, WILDER, WATSON &
LYMER,

A. A. W.,
His Attorneys.

NOTICE.

To E. C. Peters, Esquire, Attorney for Defendant:

Take notice that the foregoing motion will be presented before the Honorable Henry E. Cooper, First Judge, Circuit Court, at his courtroom in Honolulu on Monday the 29th day of July, A. D. 1912 at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

THOMPSON, WILDER, WATSON &
LYMER,

A. A. W.,
Attorneys for Plaintiff.

Honolulu, July 26, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., vs. Robert Wyllie Davis. Motion and Notice. Filed Jul. 26, 1912, 3:50 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [294]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

PARTITION.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Decision on Motion to Set Suit for Hearing.

This is a motion to set for hearing a partition suit. The defendant sets out in his sworn answer, a sworn answer being required under the pleadings, a title to the entire estate in himself.

It is well settled that a court of equity will not assume jurisdiction in a partition suit where the defendant shows a clear legal title in himself to the entire estate, or shows that there is a *bona fide* dispute as to the title. The only question before the Court is whether or not the Court will abate the proceedings to allow plaintiff to prove his title on the law side, from a reading of the pleadings only.

As, in case the pleadings disclose a good title in the plaintiff, despite the denial of plaintiff's title by the defendant, the Court will proceed to hear the suit, so, in my opinion, where the pleadings disclose a good title in the defendant to the entire estate, or a *bona fide* dispute of the title, the Court will abate the partition suit pending the determination of the legal title.

Lucas v. King, 10 N. J. Eq. 277.

The motion to set is therefore denied until such time as the plaintiff shall have determined his title at law.

Honolulu, August 14, 1912.

WM. L. WHITNEY,
Second Judge.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., v. Robert Wyllie Davis. Decision on Motion to Set Suit for Hearing. Filed Aug. 14, 1912, at 2:30 o'clock P. M. A. K. Aona, Clerk. Pau. [295]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

PARTITION.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Appeal and Notice of Appeal.

Now comes Cecil Brown, Trustee, plaintiff in the above-entitled suit, by his attorneys, Thompson, Wilder, Watson and Lymer, and gives notice of his intention to appeal, and hereby does appeal, to the Supreme Court of the Territory of Hawaii from that certain decree and order of the Honorable W. L. Whitney, Second Circuit Judge, denying plaintiff's motion to set the above suit for trial, dated August 14, 1912.

Dated Honolulu, August 15, 1912.

CECIL BROWN,

Trustee.

By His Attorneys,

THOMPSON, WILDER, WATSON &
LYMER,

A. A. W.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Appeal and Notice. Filed Aug. 15, 1912, 3:50 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [296]

[Endorsed]: Number 1828, Equity Division. Circuit Court, First Circuit. Cecil Brown, Tr., vs. Robert Wyllie Davis. 1912. Bill for Partition. Entered in Docket 29, page 21, Record —, page —. J. A. Dominis, Clerk.

No. 757. Received and filed in the Supreme Court at 8:40 A. M., Jany. 14, 1914. J. A. Thompson, Clerk. [297]

In the Supreme Court of the Territory of Hawaii,
October Term, 1912.

CECIL BROWN, Trustee,

Appellant,

vs.

ROBERT WYLLIE DAVIS,

Appellee.

Notice of Decision on Appeal.

To the Honorable WILLIAM L. WHITNEY, Second
Judge of the Circuit Court of the First Judicial
Circuit:

Territory of Hawaii:

You will please take notice that the Supreme Court
in the above-entitled cause has made the following
decision on appeal:

“DECISION ON APPEAL.

“In the above-entitled cause, pursuant to the opin-
ion of the above-entitled court filed October 16, 1912,
the order appealed from is affirmed.

“Dated Honolulu, T. H., October 25, 1912.

“By the Court.

“[Seal] (Sig.) J. A. THOMPSON,
“Clerk Supreme Court.”

Certificate.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, J. A. Thompson, Clerk of the Supreme Court
of the Territory of Hawaii, do hereby certify that
the foregoing document and attached hereto is
a full, true and correct copy of the original “Notice
of Decision on Appeal,” which is now on file in the
office of the Clerk of the Supreme Court in a cause
entitled, “Cecil Brown, Trustee, Plaintiff, against
Robert Wyllie Davis, Respondent,” (Number 657).

In witness whereof I have hereunto affixed my
hand and the seal of said Supreme Court, at Hono-

lulu, city and county of Honolulu, this 25th day of October, A. D. 1912.

[Seal]

J. A. THOMPSON,

Clerk Supreme Court, Territory of Hawaii.

[Endorsed]: Eq. 1828. Reg. 2, pg. 77. Pau. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Appellant, vs. Robert Wyllie Davis, Appellee. Certified Copy of Notice of Decision on Appeal from the Supreme Court. Filed Oct. 25, 1912, 4 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Appellant. [298]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION.

EQUITY NO. —.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Discontinuance.

Now comes the plaintiff above named, by William B. Lymer, his attorney, and discontinues the above-entitled suit, at his, said plaintiff's costs.

CECIL BROWN,

Trustee.

By WILLIAM B. LYMER,

His Attorney.

Dated Honolulu, March 15, 1915.

The foregoing discontinuance is hereby allowed and approved, this 17th day of March, 1915.

[Seal]

C. W. ASHFORD,

First Judge, First Circuit Court.

[Endorsed]: Eq. No. 1828. Reg. 2, pg. 77. No. ——. In the Circuit Court, First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Cecil Brown, Trustee, Plaintiff, v. Robert Wyllie Davis, Defendant. Discontinuance. 29/21. Filed at 2:20 o'clock P. M., March 17th, 1915. J. A. Dominis, Clerk. William B. Lymer, Attorney for Plaintiff. [299]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1913.

(\$2 Stamps.)

ACTION TO QUIET TITLE.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Complaint.

To the Honorable Presiding Judge of the Circuit Court of the First Circuit:

The undersigned, Cecil Brown, Trustee, of the city and county of Honolulu, Territory of Hawaii, plaintiff herein, complains of Robert Wyllie Davis,

of said city and county of Honolulu, defendant herein, and for cause of action alleges:

1. That the plaintiff is entitled to one undivided half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu aforesaid, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances in said Honolulu, in Book 343, pages 347-351, a copy of which lease is hereto attached and made a part hereof marked exhibit "A."

2. That defendant claims said undivided one-half of said land adversely to plaintiff, and plaintiff is desirous of having the title thereto adjudicated and quieted. [300]

3. That defendant is a necessary party to the complete determination and settlement of the question of title involved herein.

WHEREFORE, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term hereof, unless sooner disposed of by judicial authority; that defendant may be required to set up any adverse claim which he may have in and to said undivided half of said land; and for costs.

Dated Honolulu, January 15th, 1913.

CECIL BROWN,
Trustee.

Plaintiff,

THOMPSON, WILDER, WATSON &
LYMER,

A. A. W.

W. T. RAWLINS,

Attorneys for Plaintiff.

Territory of Hawaii,

City and County of Honolulu,—ss.

Cecil Brown, Trustee, being duly sworn, deposes and says: That he is the plaintiff above named; that he has read the foregoing complaint and that the same is true.

CECIL BROWN,
Trustee.

Subscribed and sworn to before me this 15th day of January, A. D. 1913.

[Seal]

F. F. FERNANDES,

Notary Public, First Judicial Circuit, Territory of Hawaii. [301]

Exhibit "A" [to Complaint].

THIS INDENTURE of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee,

WHEREAS, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Of-

fice, Oahu, in Liber 136, pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, nevertheless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust,

AND WHEREAS, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright, and at the instance of the said Bruce Cartwright, by an order of a Judge of the First Circuit Court of the said Territory of Hawaii,

NOW THIS INDENTURE WITNESSETH: That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

TO HAVE AND TO HOLD the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said lessee, his executors, administrators and assigns for and during the term of twenty-five years from the first day of June, A. D. 1910.

Yielding and paying therefor rent as follows:
[302]

For the first year the rental shall be free.

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500.00) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenants with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

IN WITNESS WHEREOF, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

(S.) JNO. D. HOLT, Trustee.

“ A. V. GEAR.

KNOW ALL MEN BY THESE PRESENTS:

That I, Robert Wyllie Davis of Mokapu, Koolau-poko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of use give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or

which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust.

(S.) ROBERT WYLLIE DAVIS. [303]

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me personally appeared John D. Holt, Trustee, and A. V. Gear to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] (S) WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal] (S) WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed Jan. 16, 1913, 11:15 o'clock
A. M. J. A. Dominis, Clerk. [304]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

A. D. 1913, Term.

(\$2 Stamps)

TERM SUMMONS.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Summons.

The Territory of Hawaii, to the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, —— or His Deputy:

YOU ARE COMMANDED to summon Robert Wyllie Davis, defendant, in case he shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, to wit, the A. D. 1914 term thereof, to be holden at Honolulu, City and County of Honolulu, on Monday, the 12th day of January next, at 10 o'clock A. M., to show cause why the claim of Cecil Brown, Trustee, plaintiff, should not be awarded to him pursuant to the tenor of his annexed complaint.

And have you then there this Writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit at Honolulu aforesaid, this 16th day of January, 1913.

[Seal]

J. A. DOMINIS,
Clerk.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii, do hereby certify and make return that I served the within Summons, Complaint and Exhibit "A" as follows:

On Robert Wyllie Davis, therein named as defendant, at Kaneohe, District of Koolaupoko, City and County of Honolulu, Territory of Hawaii this 18th day of January, A. D. 1913, by delivering to him a certified copy hereof and of the Complaint and Exhibit "A" annexed hereto and at the same time showing him the original as herein directed.

Dated Honolulu, City and County of Honolulu, Territory of Hawaii this 18th day of January, A. D. 1913.

WM. HENRY,

High Sheriff, Territory of Hawaii.

Lr. 7695. Reg. 4, pg. 159. Circuit Court, First Circuit. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Term Summons. Issued at 11:15 o'clock A. M., Jan. 16th, 1913. J. A. Dominis, Clerk. Returned at 11 o'clock A. M., Jan. 20th, 1913. J. A. Dominis, Clerk.

[Written in pencil across face and margin of endorsement.]

9.75

13.75

29/171 Pau. Motion for nonsuit granted. Chin
set. [305]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Answer.

Comes now the defendant above named and by way of answer to the complaint of plaintiff herein denies the allegations of paragraph one and paragraph two of said complaint.

And by way of further answer thereto, defendant alleges and avers:

1. That he is the owner in fee simple of an undivided one-half interest of said land known as "Mokapu" and plaintiff has no right, title, interest and or estate in and to the whole or any part of said land.

WHEREFORE, defendant prays that he be hence dismissed, with his costs herein incurred.

Feb. 7th, 1913.

E. C. PETERS,
Attorney for Defendant.

[Endorsed]: A. 7695. Reg. 4, pg. 159. No.——. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown vs. R. W. Davis. Answer. Filed at 5 P. M., Feb. 7, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for ——. [306]

*In the Circuit Court of the Territory of Hawaii,
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Demand for Jury Trial.

Comes now the defendant above named and demands a trial by jury herein.

Feb. 7th, 1913.

E. C. PETERS,
Attorney for Defendant.

[Endorsed]: L. 7695. Reg. 4, pg. 159. No. ——. Circuit Court, First Circuit, Territory of Hawaii.

Cecil Brown vs. R. W. Davis. Jury Demand. Filed at 5 P. M., Feb. 7, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H. Attorney for ——. [307]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET TITLE.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Motion to Set.

Comes now the plaintiff above named, by his attorneys, Thompson, Wilder, Watson & Lymer, and moves this Honorable Court that the above-entitled cause be set for trial on a day certain.

Dated Honolulu, April 4, 1913.

CECIL BROWN, Trustee,

Plaintiff.

By THOMPSON, WILDER, WATSON &
LYMER,

W. B. L.,

His Attorneys,

Notice.

To Defendant Above Named and to E. C. Peters, Esquire, His Attorney:

You and each of you will please take notice that the foregoing Motion to Set will be presented be-

fore the Honorable W. L. Whitney, Second Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii, at his courtroom in the Judiciary Building, Honolulu, on Monday, April 7, 1913, at 9 o'clock A. M., or as soon thereafter as counsel may be heard.

THOMPSON, WILDER, WATSON &
LYMER,

W. B. L.,

Attorneys for Plaintiff.

[Endorsed]: L. 7695. Reg. 4, pg. 159. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Motion to Set and Notice. Filed Apr. 4, 1913, 3:40 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [308]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Cost Bill.

Comes now the defendant herein and presents this his cost bill herein, and respectfully asks that the same upon presentation be allowed:

Answer and one copy.....	\$ 4.50
Presence at trial.....	3.00
Cost bill, copy and service.....	50
Attendance upon taxation of costs..	1.00
Costs of court.....	13.75

Total \$22.75

Dated this 25th day of June, A. D. 1913.

E. C. PETERS,

Attorney for Defendant.

Costs are hereby taxed in the sum of \$22.75.

WM. L. WHITNEY,

Presiding Judge at Trial. [309]

Notice [of Presentation of Cost Bill].

To the Above-named Plaintiff and Messrs. Thompson, Wilder, Watson & Lymer, His Attorneys.

You and each of you will hereby please take notice that the foregoing cost bill will be presented to his Honor W. L. Whitney, Second Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, in his courtroom in the Judiciary Building at Honolulu, city and county of Honolulu, Territory aforesaid, on Friday next, the 27th day of June, A. D. 1913, at the hour of two (2) o'clock P. M. of said day, or as soon thereafter as counsel can be heard.

Dated this 25th day of June, A. D. 1913.

E. C. PETERS,

Attorney for Defendant.

[Endorsed]: L. 7695. Reg. 4, pg. 159. L. No. 7695. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Cost Bill and Notice. Filed 5:30 P. M., June 25, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [310]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Decision.

This is an action at law to quiet title.

Upon the trial and prior to plaintiff having rested, he, by his counsel, prayed the Court that a nonsuit be entered herein.

Let judgment for a nonsuit be entered accordingly.

Dated this 25th day of June, A. D. 1913.

WM. L. WHITNEY,

Judge Presiding at Trial.

[Endorsed]: L. 7695. Reg. 4, pg. 159. L. No. 7695, Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant. Decision. Filed 12:05 P. M., June 26, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [311]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Judgment.

The within action at law to quiet title came on regularly for hearing before this Court, the Honorable W. L. Whitney, Second Judge thereof, presiding, this —— day of May, A. D. 1913, when the parties appeared and were at issue to the Court, jury having been waived.

Plaintiff having asked that a voluntary nonsuit be entered and it having been so ordered:

THEREFORE, IT IS ADJUDGED, that the complaint herein be dismissed without prejudice and

defendant recover of plaintiff his costs taxed at \$22 75/100.

By the Court,
JOHN MARCALLINO,
Clerk.

Entered this 27th day of June, A. D. 1913.

JOHN MARCALLINO,
Clerk.

[Endorsed]: L. No. 7695. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis. Judgment. Filed June 27/13. A. K. Aona, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [312]

[Endorsed]: Number 7695. Law Division. Circuit Court, First Circuit. Cecil Brown, Tr., vs. Robert Wyllie Davis. 1913. Action to Quiet Title. Entered in Docket 29, page 171, Record 4, page 159. J. A. Dominis, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [313]

[Opinion.]

In the Supreme Court of the Territory of Hawaii.
October Term, 1914.

FRED HARRISON

vs.

ROBERT WYLLIE DAVIS.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

Hon. W. L. WHITNEY, Judge.

Argued February 11, 1915. Decided March 4, 1915.

ROBERTSON, C. J., QUARLES, J., and Circuit
Judge ASHFORD in Place of WATSON, J.,
Disqualified.

Quieting Title—Statutory Action—Title in Stranger.

In an action to quiet title where the plaintiff has adduced evidence of title a defendant who has no title may not defeat the plaintiff's case by showing that one not a party to the action has a title superior to that relied on by the plaintiff.

Trusts—Alienation of Equitable Interest—Object of Trust.—The right of alienation is not a necessary incident to an equitable interest to income or support for the life of the beneficiary, and it does not exist where it would be destructive of the trust or is incompatible with its purposes though there be no express prohibition against alienation. [314]

OPINION OF THE COURT BY ROBERTSON,
C. J.

This case was previously before this Court on exceptions brought by the plaintiff. *Ante*, p. 51. As stated in the former opinion, the plaintiff seeks to have quieted as against the defendant his claim of title to an undivided one-half of the land of Mokapu, Island of Oahu, for a term of years which was demised originally by Holt, trustee, to one Gear, by an indenture dated June 1st, 1910. The common source of title under which these parties claim is a trust deed executed by John K. Sumner on August 16, 1892, the substance of which was set forth in the former opinion.

At the trial of an action to quiet title under the statute (R. L. Ch. 132) it is incumbent upon the plaintiff to prove a title in or to the land in dispute, and, if he fails to do so, it will be unnecessary for the defendant to make any showing. In case each party adduces evidence of title and it appears that the claims are adverse the Court will decide between them, but the defendant may not defeat the plaintiff's case by showing that although he has no title in himself, one who is not a party to the action has a title superior to that relied on by the plaintiff.

When this case was last before this Court the judgment of nonsuit theretofore entered in the Circuit Court was set aside. It was held that the deed of trust created an active trust; that the legal title to the land remained in the trustee and had not been executed by the statute of uses; and that the writ-

ten consent and confirmation of the lease from the trustee to Gear, given by the defendant, operated as a waiver of his right to occupy and use the land pursuant to the provisions of the deed of trust. Upon the resumption of the trial in the Circuit Court the defendant introduced in evidence, over the objection of the plaintiff, a [315] warranty deed dated January 1, 1906, executed by the defendant, purporting to convey to John K. Sumner "all my one-half undivided share or interest" in the land of Mokapu, and a mortgage by the defendant to Sumner of "all my undivided one-half share and interest" in Mokapu, dated January 2, 1906. This evidence was afterwards held to be inadmissible and was stricken out on the ground that it could tend to show no more than that possibly there was a title in a stranger. The ruling was correct. Another point made by the defendant is that by reason of a certain admission made at the trial by counsel for the plaintiff the plaintiff could not recover, in any event, more than an undivided one-fourth of the premises. The record shows that the plaintiff's counsel said "We admit that Robert Wyllie Davis took a half of our term of years, 25 term of years." The statement, if correctly reported, was not happily phrased, but what counsel meant evidently was that the plaintiff admitted that the defendant owned a half interest in the term demised to Gear. That must have been the understanding of the trial Court, and, we are satisfied, that was the proper view to be taken of it. The Circuit Court held that the defendant had

not rebutted the *prima facie* case previously made by the plaintiff, and judgment was entered declaring and confirming the plaintiff's ownership and right to possession of an undivided one-half interest in the land in question for a term of years, to wit, until June 1, 1935.

Counsel for the defendant (now plaintiff in error) contend that the lease from Holt, trustee, to Gear was a nullity and passed no interest in the land because, (1) the Sumner trust deed created a mere passive trust which, by the statute of uses, vested the legal title in the beneficiary, and (2) because, even if the trust was an active one, the defendant's equitable interest was assignable, both as to the rents and profits of the land and as [316] to the right of residence and use, which said interest the defendant had conveyed by deed and mortgage to Sumner, as above stated, prior to the execution of the Gear lease, and Sumner had entered into possession of the land under one or both of those instruments. There was a question as to whether or not the evidence showed that Sumner was still in possession on the date of the lease to Gear, but in the view we take of the matter that would be immaterial. We are satisfied that the ruling heretofore made by this Court that the trust deed from Sumner to Cartwright created an active trust was correct for the reasons stated in the former opinion. The trust deed did not expressly prohibit the assignment by Davis of his right to the rents. It seems to be conceded, and we may assume, that he could make a valid assignment of the rents and that the conveyances to Sumner were effectual

to pass to the grantee the right to receive rents collected by the trustee. *McCandless v. Castle*, 19 Haw. 515, 518. But could he assign his right to "reside upon said premises and while so residing to use the same for grazing or agricultural purposes?" The clear weight of authority in the United States is to the effect that a trust may be created under which the beneficiary may be entitled to receive an income which he cannot anticipate by assignment and which is free from the claims of creditors, and it is held that the right of alienation is not a necessary incident to an equitable interest to income or support for the life of the beneficiary. It is also held that the right of alienation of such an interest does not exist where it would be destructive of the trust and incompatible with its purposes though there be no express prohibition. 39 Cyc. 236; *Perkins v. Hays*, 3 Gray, 405, 409; *Baker v. Brown*, 146 Mass. 369, 371; *Seymour v. McAvoy*, 121 Cal. 438, 442; *Mattison v. Mattison*, 53 Ore. 254, 259; *Barnes v. Dow*, 59 Vt. 530, 543; *First Nat. Bank v. Trust Co.*, 62 S. W. (Tenn.) 392, 399; [317] *Monday v. Vance*, 51 S. W. (Tex.) 346, 349; *Roberts v. Stevens*, 84 Me. 325; *Bennett v. Bennett*, 217 Ill. 434, 442. We hold that under the deed of trust here involved the right of Davis to occupy and use the land for certain purposes was personal to Davis and did not extend to his assigns. This was the intention of the donor as we gather it from the deed. The object was to provide and secure for the defendant either a home and an opportunity to make a living out of the land, or an income, as he might elect to take. A right to assign the right of

occupancy would be incompatible with that object and we must give effect to the apparent intention of the donor in this respect even though the right to assign the income was not restricted. The defendant having waived his right to occupy the premises, the lease to Gear was valid and operative, and its validity was not affected by the conveyances made by the defendant to Sumner.

Our conclusion is that the judgment of the Circuit Court was in accordance with the law and the evidence, and it is affirmed.

R. J. O'BRIEN (E. C. PETERS, with him on the brief), for plaintiff in error.

W. B. LYMER (THOMPSON, WILDER, MILVERTON & LYMER, on the brief), for defendant in error.

A. G. M. ROBERTSON.

RALPH P. QUARLES.

C. W. ASHFORD.

[Endorsed]: No. 814. Supreme Court, Territory of Hawaii. October Term, 1914. Fred Harrison vs. Robert Wyllie Davis. Opinion. Filed March 4, 1915, at 2:24 P. M. J. A. Thompson, Clerk. [318]

In the Supreme Court of the Territory of Hawaii.
October Term, 1914.

FRED HARRISON,

Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error.

Judgment.**ERROR TO CIRCUIT COURT, FIRST
CIRCUIT.**

In the above-entitled cause, pursuant to the opinion of the above-entitled court, filed March 4, 1915,

IT IS ORDERED, ADJUDGED AND DECREED that the judgment of the Circuit Court, First Circuit, entered on the 26th day of June, 1914, be and the same is hereby affirmed.

Dated at Honolulu, T. H., this 9th day of March, 1915.

By the Court:

[Seal]

J. A. THOMPSON,
Clerk Supreme Court.

R.

[Endorsed]: No. 814. Supreme Court of the Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in Error, vs. Robert Wyllie Davis, Defendant-Plaintiff in Error. Judgment. Filed March 9, 1915, at 3:45 P. M. J. A. Thompson, Clerk. William B. Lymer, Attorney for Plaintiff-Appellee.
[319]

In the Supreme Court of the Territory of Hawaii.
October, A. D. 1914, Term.

ACTION TO QUIET TITLE AT LAW.
ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error,
vs.
FRED HARRISON,
Plaintiff-Defendant in Error,

Petition for Writ of Error and Supersedeas.

To the Honorable the Supreme Court of the Territory of Hawaii:

The above-named defendant, Robert Wyllie Davis, deeming himself aggrieved by the judgment of the Honorable the Supreme Court of the Territory of Hawaii, entered and filed on or about the 7th day of April, A. D. 1915, in a cause entitled "Fred Harrison, Plaintiff (defendant in error), vs. Robert Wyllie Davis, Defendant (plaintiff in error)," numbered and docketed in said court as No. 814, comes now by E. C. Peters, Esq., his attorney, and hereby humbly petitions said Supreme Court of the Territory of Hawaii for an order allowing said Robert W. Davis to prosecute a writ of error and have the same allowed and issued from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii, under and according to the laws of the United States in that behalf made and provided thereto, and that the transcript of the record, proceedings and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to said United States Circuit [320] Court of Appeals for the Ninth Circuit, and also, that an order may be made by this Honorable Court fixing the amount of the bond which the said defendant shall give and furnish upon said writ of error, and that upon the filing of such bond, all proceedings relative to the subject matter in and of said cause, in the Supreme Court of the Territory of Hawaii and in the Circuit Court of the First

Judicial Circuit of the Territory of Hawaii, whether direct or ancillary thereto, be suspended and stayed until the determination of such writ of error by the Honorable the United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioner shows that the said judgment was rendered in an action at law, and that the amount involved exclusive of costs, exceeds the value of \$5,000.

Dated at Honolulu, T. H., this 21st day of May, A. A. 1915.

E. C. PETERS,
Attorney for Petitioner. [321]

Affidavit of C. E. Peters.

City and County of Honolulu,
Territory of Hawaii,
United States of America,—ss.

E. C. Peters, being first duly sworn, deposes and says:

That he is the attorney for the above-named petitioner; that he has read the foregoing petition and knows its contents, and that the matters and things therein set forth are true of his own knowledge; and, further, that the amount involved in said cause, exclusive of costs, exceeds the value of \$5,000.

E. C. PETERS.

Subscribed and sworn to before me this 21st day of May. A. D. 1915.

[Seal] HILDA SMITH,
Notary Public, 1st Judicial Circuit, Territory of
Hawaii.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Petition for Writ of Error and Supersedeas. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. [322]

In the Supreme Court of the Territory of Hawaii.
October, A. D. 1914, Term.

ACTION TO QUIET TITLE AT LAW.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

Assignment of Errors.

And now comes Robert Wyllie Davis, the defendant and plaintiff in error in the above-entitled cause, by E. C. Peters, Esq., his attorney, and says that in the record and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii there is manifest error, to the prejudice of said defendant in error, in this, to wit:

1. That the Supreme Court of the Territory of Hawaii erred in its judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, for the reason that said judgment was contrary to the evidence and the law.

2. That the Supreme Court of the Territory of Hawaii erred in not reversing the judgment of the

Circuit Court of the First Judicial Circuit of the Territory of Hawaii as contrary to the law and the evidence, and ordering that said First Circuit Court vacate and set aside the judgment theretofore entered in favor of plaintiff and enter a judgment in [323] favor of defendant in said cause.

3. That the said Supreme Court, in considering the errors assigned upon a writ of error issued at the instance of this plaintiff in error from said Supreme Court to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii to correct certain rulings of said First Circuit Court in and upon the trial of said cause, erred in holding and deciding that no error had been committed by the trial court as alleged in the following first assignment of error:

1. That the trial Court erred in admitting over the objection of defendant the consolidated certified copies of the lease dated June 1, 1910, from John D. Holt, Trustee, to A. V. Gear, of the land of "Mokapu" described in the trust deed from John K. Sumner to Bruce Cartwright, Trustee, dated August 16, 1892, and on August 17, 1892, recorder in the office of the Registrar of Conveyances of the Territory of Hawaii in liber 136, at pages 136-137), of the undated consent thereto by Robert Wyllie Davis, and of the mesne assignments thereof by said A. V. Gear to Charles F. Peterson dated October 12, 1910, from the latter to Addie B. Gear dated October 12, 1910, and from Addie B. Gear to the plaintiff Fred Harrison dated October 21, 1910. Said lease, consent and mesne assignments were recorded

in the said Registry Office on May 6, 1911, in liber 343, at pages 347 *et seq.*

The offer was objected to by defendant as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in the case, and on the further ground that said Holt named as trustee was not a trustee, but a pretended or fictitious trustee, and that he had no authority in law to give such a lease.

4. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following second assignment of error:

2. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to the plaintiff while a witness on his own behalf on cross-examination, whether he (said plaintiff) were the same person named as mortgagee in a purported mortgage given by A. V. Gear to one Fred Harrison [324] dated November 16, 1910, and upon which the proceedings in Equity Case No. 1814 were predicated.

Plaintiff's objection was that it was not proper cross-examination.

5. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following third assignment of error:

3. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to

plaintiff on cross-examination concerning his, said plaintiff's identity with the mortgagee named in a certain chattel mortgage from Addie B. Gear to one Fred Harrison dated June 9, 1911, connected with the certain foreclosure proceedings brought by the said Fred Harrison against A. V. Gear and Addie B. Gear, his wife, No. 1814 Equity Division, and recorded in liber 351, at page 121, the said question being as follows:

Q. I want to call your attention to another document connected with this equity case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison named in that particular document.

Plaintiff's objection to the question was that it was not proper cross-examination.

6. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following fourth assignment of error:

4. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the question propounded by defendant to plaintiff on cross-examination touching the identity of plaintiff with one Fred Harrison named as grantee in the certain deed from one Cecil Brown dated February 29, 1912, and recorded in said Registrar's Office in liber 366, at page 140.

Plaintiff objected to the question on the ground that it was not proper cross-examination.

7. That the Supreme Court of the Territory of

Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following fifth assignment of error:

5. That the Court erred in permitting over the objection of defendant the question propounded to the plaintiff on redirect examination as follows: [325]

the land of "Mokapu" described in the trust deed

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear.

The objection of defendant to the question was that it was not proper redirect examination.

8. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following sixth assignment of error:

6. That the Court erred in permitting over the objection of defendant the question propounded plaintiff on redirect examination concerning the witness's connection with the signature appended to a certain purported assignment from Addie B. Gear to the witness, dated June 6, 1913.

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in the case.

9. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error

had been committed by the trial court as alleged in the following seventh assignment of error:

7. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a certain purported agreement between Addie B. Gear and Fred Harrison, dated June 6, 1913.

This instrument was admitted as Plaintiff's Exhibit "C."

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

10. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighth assignment of error:

8. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a deed from Cecil Brown, Trustee, to Fred Harrison, dated June 9, 1913, the record in Equity Case No. 1293 and the lease from John D. Holt, Trustee, to A. V. Gear dated June 1, 1910, and an assignment of lease from A. V. Gear to Robert W. Davis dated June 16, 1910.

The defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

[326]

11. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following ninth assignment of error:

9. That the Court erred in overruling defendant's objection to and admitting in evidence upon

the offer of plaintiff an assignment of A. V. Gear to Robert W. Davis, the defendant, dated June 16, 1910, of an undivided one-half interest in and to of his lease of Mokapu.

Defendant's objection to this offer was that it was incompetent, irrelevant and immaterial and did not prove or tend to prove any of the issues in the case.

The instrument was admitted as Plaintiff's Exhibit "A."

12. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following tenth assignment of error:

10. That the Court erred in overruling defendant's motion for a nonsuit, which was upon the following grounds:

(1) That the plaintiff had failed to show, nor was there any evidence tending to show, that the plaintiff was entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint.

(2) That the plaintiff had failed to show and there was no evidence, either competent or otherwise, tending to show that he had any interest in the land known as Mokapu aforesaid.

(3) That the alleged and pretended appointment of one John D. Holt, or John D. Holt, Jr., by a Judge of the Circuit Court of the First Circuit, was null and void, in this, that the Circuit

Court was without jurisdiction to make such appointment; and

(4) That it affirmatively appeared from the evidence that at the time of the execution of the alleged lease to the plaintiff, the defendant was possessed of a life estate in the land so referred to as "Mokapu," free and clear from any and all trusts.

13. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eleventh assignment of error:

11. That the Court erred in overruling defendant's objection to and admitting in evidence upon plaintiff's offer, the record and files in Case No. 1828, Equity Division of the Circuit Court of the First Circuit. [327]

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

14. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twelfth assignment of error:

12. That the Court erred in overruling the objection of defendant to and permitting the following question to be propounded by plaintiff's counsel to plaintiff who had been recalled as a witness on his own behalf:

Q. I will ask you this: In this foreclosure proceeding when the time came for a sale to be made,

a commissioner's sale under order of the Court, who brought in whatever interests were foreclosed in this proceeding.

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

15. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirteenth assignment of error:

13. That the Court erred in overruling the objection of defendant to and permitting to be propounded to plaintiff by his counsel (recalled as a witness on his own behalf) the following question:

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title.

Defendant's objection was that the question was immaterial.

16. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following fourteenth assignment of error:

14. That the Court erred in overruling the objection of defendant on the ground of immateriality and admitting in evidence upon the offer of plaintiff, the record and files of Law No. 7695 of the Circuit Court of the First Judicial Circuit.

17. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in

the following fifteenth assignment [328] of error:

15. That the Court erred in overruling the objection of defendant on the ground of immateriality and permitting plaintiff's counsel to propound to the plaintiff who was recalled for further examination, the following question:

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When the nonsuit was granted, what, if anything, further did you do?

18. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following seventeenth assignment of error:

17. That the Court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner of an undivided one-half interest in the land known as "Mokapu," dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

Plaintiff's objection was that it was incompetent, irrelevant and immaterial and defendant was estopped from introducing any such deed in evidence.

19. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighteenth assignment of error:

18. That the Court erred in sustaining the ob-

jection of plaintiff to and rejecting the offer of defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii in liber 303, at page 91, whereby the said Robert W. Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence.

20. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following nineteenth assignment of error:

19. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the following question [329] propounded by defendant to the defendant Robert Wyllie Davis, while a witness on his own behalf in defense:

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d day of January, 1906, recorded in liber 303, at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage?

Plaintiff's objection was that the question was incompetent, irrelevant and immaterial, and the defendant was estopped from introducing any such papers in evidence.

21. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twentieth assignment of error:

20. That the Court erred in overruling the objection of defendant to and permitting the following question propounded by plaintiff to A. V. Gear, called as a witness by plaintiff in rebuttal:

Q. Were you still working under the agreement with Wyllie Davis at the time you took this 25-year leasehold?

Defendant's objection was that the question was incompetent, irrelevant, and immaterial.

22. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-first assignment of error:

21. That the Court erred in denying defendant's motion to strike out the answer of the witness A. V. Gear given on direct examination on rebuttal, as follows:

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

The ground of defendant's motion was that it appeared that the witness was testifying in respect to two agreements, the contents of which were unknown.

23. That the Supreme Court of the Territory of

Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-second assignment of error:

22. That the Court erred in overruling the objection of defendant to the question propounded by plaintiff to the witness A. V. Gear on direct examination in rebuttal, as follows:
[330]

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gear, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his interest to Sumner was discussed?

Defendant's objection was on the ground that there were not any agreements in evidence and the time laid was indefinite.

24. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-third assignment of error:

23. That the Court erred in overruling the defendant's objection to the following question propounded to the witness A. V. Gear, on direct examination:

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

Defendant's objection to this question was that it was irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues

of the case and calling for a conclusion of the witness.

25. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-fourth assignment of error:

24. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound the following question on direct examination of the witness A. V. Gear who had been called on rebuttal:

Q. Just answer "Yes" or "No" to this question: Did you ever know from Wallie Davis' own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and indefinite.

26. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-fifth assignment of error:

25. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound the following question to the witness Gear on direct examination while called in rebuttal:

Q. Will you state what that statement was?
[331]

Defendant's objection to the question was that

it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

27. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-sixth assignment of error:

26. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound to the witness Gear on cross-examination when called in rebuttal, the following question:

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he spoke of giving Mokapu as security, did he mention anything about the amount of the advances which he had secured?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial.

28. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following twenty-seventh assignment of error:

27. That the Court erred in overruling the objection of defendant to and permitting the plaintiff to propound to the witness Gear on direct examination on rebuttal, the following question:

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the

assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910?

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

29. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-eighth assignment of error:

28. That the Court erred in granting over the objection of defendant plaintiff's motion to amend the prayer of his complaint to read as follows:

"Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the [332] traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted and that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

Defendant's objection was that the motion was made too late.

30. That the Supreme Court of the Territory of

Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-ninth assignment of error:

29. That the Court erred in finding for the plaintiff for an undivided half of the term of years set out in the complaint, said finding being against the law and the evidence and the weight of the evidence.

31. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirtieth assignment of error:

30. That the Court erred in not finding and deciding that the plaintiff was not entitled to any interest whatsoever in the land known as Mokapu.

32. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirty-first assignment of error:

31. That the Court erred in entering its judgment herein adjudging that the plaintiff was the owner and entitled to the immediate possession of an undivided one-half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances in said Honolulu in liber 343, at pages 347-351,

upon the ground that said judgment is contrary to the law and the evidence and the weight of the evidence.

33. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed [333] by the trial court as alleged in the following thirty-second assignment of error:

32. That the Court erred in adjudging that the plaintiff was entitled to any interest in the land known as Mokapu.

34. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirty-third assignment of error:

33. That the Court erred in not entering its judgment herein that plaintiff take nothing by his said action.

WHEREFORE, plaintiff in error prays that the judgment of said Supreme Court be reversed, and that the Supreme Court of the Territory of Hawaii be ordered to enter an order reversing the judgment of said First Circuit Court and ordering said First Circuit Court to enter judgment for defendant in said cause.

Dated this 21st day of May, A. D. 1915.

E. C. PETERS,

Attorney for Defendant in Error, Robert Wyllie Davis.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in

Error. Assignment of Errors. Filed May 22, 1915,
at 11:29 A. M. J. A. Thompson, Clerk. E. C.
Peters, Esq., Attorney for Plaintiff in Error. [334]

In the Supreme Court of the Territory of Hawaii.

October, A. D. 1914, Term.

(Stamps)

ACTION TO QUIET TITLE AT LAW.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

Supersedeas and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Robert Wyllie Davis, of Koolaupoko, city and county of Honolulu, Territory of Hawaii, as principal, and Eugene D. Buffandeau, Charles H. Rose and George M. Yamada, all of Honolulu, city and county of Honolulu, Territory of Hawaii, as sureties, are jointly and severally held firmly bound unto Fred Harrison in the full and just sum of \$500, to the payment whereof well and truly to be made unto the said Fred Harrison, his administrators, executors or assigns, we hereby bind ourselves, our and each of our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS
AS FOLLOWS:

WHEREAS, in the above-entitled cause, a petition

has been filed for the allowance of a writ of error to have the judgment of said Supreme Court of the Territory of Hawaii, entered and filed in the above-entitled cause on or about the 7th day of April, A. D. 1915, and the proceedings in said cause prior thereto, reviewed by the United States [335] Circuit Court of Appeals for the Ninth Circuit, and to have issued a supersedeas herein;

NOW, THEREFORE, if such writ of error and supersedeas shall issue according to the prayer of the petition in that behalf, and if the said Robert Wyllie Davis, the above-bounden principal, shall prosecute said writ of error to effect and answer all damages and costs, if he fails to make good his plea, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ROBERT WYLLIE DAVIS, (Seal)

Principal.

E. BUFFANDEAU, (Seal)

Surety.

CHARLES H. ROSE,

Surety.

GEO. M. YAMADA, (Seal)

Surety.

Certificate of Clerk.

United States of America,
Territory of Hawaii,—ss.

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that Eugene D. Buffandeau and George M. Yamada, parties to this bond whose genuine signatures appear subscribed to the above bond, are in my opinion good

and ample security for the amount therein specified, and that they have property in said Territory of Hawaii subject to execution in excess of the amount of said bond, and that if the bond was presented to me for approval the same would be accepted and approved.

WITNESS my hand this 21st day of May, A. D. 1915. [336]

Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing bond is approved as to form and sufficiency, this 22d day of May, A. D. 1915.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Approved as to form and sufficiency.

Attorney for Plaintiff.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Supersedeas and Cost Bond on Writ of Error. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. Received at 10:30 A. M., May 27, A. D. 1915. ———, Deputy High Sheriff. [337]

In the Supreme Court of the Territory of Hawaii.
October, A. D. 1914, Term.

ACTION TO QUIET TITLE AT LAW.
ROBERT WYLLIE DAVIS,
Defendant-Plaintiff in Error,
vs.
FRED HARRISON,
Plaintiff-Defendant in Error.

Order Allowing Writ of Error and Supersedeas.

Upon reading and filing the foregoing petition for a writ of error, together with an assignment of errors presented therewith, alleged to have occurred in the judgment of this court and in the proceedings in the trial of said cause prior thereto, IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Robert W. Davis to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause and the proceedings in the trial of said cause prior thereto, and that the amount of the bond to be filed in this court by the said Robert W. Davis in connection with the writ of error prayed for, be and the same is hereby fixed in the sum of \$500.00; and IT IS FURTHER ORDERED that upon the filing of an approved bond in said amount, all further proceedings in said Supreme Court of the Territory of Hawaii, and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, in and of said cause, and whether direct or ancillary thereto, shall be suspended and

stayed until the determination of such writ of error to the United [338] States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, T. H. this 22d day of May, A. D. 1915.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Served the within Supersedeas and cost bond on writ of error, Certificate of Clerk, Writ of Error, Petition for Writ of Error and Supersedeas, Affidavit of E. C. Peters, Assignment of Errors, Order Allowing Writ of Error and Supersedeas and Citation in Error, on Fred Harrison, therein named as plaintiff-defendant in error, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 27th day of May, A. D. 1915, by delivering to him a certified copy of the within Supersedeas and Cost Bond on Writ of Error, Certificate of Clerk, Writ of Error, Petition for Writ of Error and Supersedeas, Affidavit of E. C. Peters, Assignment of Errors, Order Allowing Writ of Error and Supersedeas and Citation in Error, and at the same time showing him the original.

Dated at Honolulu, city and county of Honolulu, Territory of Hawaii, this 27th day of May, A. D. 1915.

PATRICK GLEASON,

Deputy High Sheriff, Territory of Hawaii.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis,

Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Order Allowing Writ of Error and Superseas. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. [339]

In the Supreme Court of the Territory of Hawaii.

October, A. D. 1914, Term.

ACTION TO QUIET TITLE AT LAW.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America: To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the Territory of Hawaii before you, or some of you, between Fred Harrison, plaintiff (defendant in error), and Robert W. Davis, defendant (plaintiff in error), a manifest error hath happened, to the damage of the said Robert Wyllie Davis, as by said complaint in said court appears; and we being willing that such error if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf,

do command you if judgment be therein given, that then under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals of the Ninth Circuit at the courtrooms of said court in the [340] city of San Francisco, State of California, together with this writ, so that you have the same at the said place where said court is sitting, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the error, what of right and according to the laws and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the J. A. T. 22d day of May, in the year of our Lord One Thousand *Nineteen* Fifteen, and of the Independence of the United States the One Hundred Fortieth.

J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing writ is hereby allowed.

Dated May 22d, 1915.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii. [341]

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis,

Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Writ of Error. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. [342]

In the Supreme Court of the Territory of Hawaii.
October, A. D. 1914, Term.

ACTION TO QUIET TITLE AT LAW.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

Citation [on Writ of Error].

The United States of America,—ss.

To Fred Harrison, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days after the date of this citation pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Robert Wyllie Davis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the

United States, this 22d day of May, A. D. 1915.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory
of Hawaii. [343]

Due and proper service of the above citation and
receipt of a true copy hereof is hereby admitted this
21st day of May, A. D. 1915.

Attorney for Fred Harrison. [344]

[Endorsed]: No. 814. In the Supreme Court of
the Territory of Hawaii. Robert Wyllie Davis,
Plaintiff in Error, vs. Fred Harrison, Defendant in
Error. Citation in Error. Filed and issued May
22, 1915, at 11:29 A. M. J. A. Thompson, Clerk.
Returned May 28, 1915, at 1:30 P. M. J. A. Thomp-
son, Clerk. Received at 10:30 A. M., May 27, A. D.
1915. P. Gleason, Deputy. E. [345]

In the Supreme Court of the Territory of Hawaii.

ACTION TO QUIET TITLE AT LAW.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

**Order Extending Time for Preparation and
Transmission of Record.**

Upon the application of counsel for plaintiff in
error, and good cause appearing therefor, and pur-
suant to section 1 of Rule 16 of the United States Cir-

Praeceptum for Transcript.

To James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

YOU WILL PLEASE prepare a transcript of the record in this cause (said cause being entitled in the Supreme Court of the Territory of Hawaii, "Fred Harrison, Plaintiff-Defendant in Error, vs. Robert Wylie Davis, Defendant-Plaintiff in Error,") to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error heretofore issued by said court and include in said transcript the following pleadings, exhibits, proceedings, opinions, judgments and papers on file in said cause, to wit:

1. Petition for Writ of Error to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, dated November 11, 1914;
2. Assignment of Errors, dated November 11, 1914;
3. Notice that Writ of Error has issued, dated November 11, 1914;
4. Summons, dated November 11, 1914, with return of service appended thereto;
5. Bond on Writ of Error, dated November 11, 1914;
6. Writ of Error, dated November 11, 1914;
7. Appearance of counsel for defendant in error, dated November 11, 1914;
8. Bill of Complaint, dated June 12, 1913, and attached thereto as exhibit "A" thereof is a lease dated June 1, 1910, between John D.

Holt, Trustee, and A. V. Gear, and the consent and confirmation of lease by Robert Wyllie Davis; [348]

9. Term Summons dated June 12, 1913, with return of service annexed thereto;
10. Answer of defendant and demand for trial by jury filed July 1, 1913;
11. Answer of defendant and demand for trial by jury filed July 2, 1913;
12. Statement of Facts, dated October 21, 1913;
13. Motion to reopen plaintiff's case for further evidence, dated November 15, 1913, and notice of motion;
14. Decision of Hon. W. L. Whitney on defendant's motion for nonsuit, filed December 22, 1913;
15. Exception by plaintiff to decision on defendant's motion for nonsuit, filed December 23, 1913;
16. Judgment on defendant's motion for nonsuit, dated January 2, 1914;
17. Exception by plaintiff to judgment on defendant's motion for nonsuit, dated January 2, 1914;
18. Opinion of the Supreme Court of Hawaii, rendered March 6, 1914 (on the first trial), (Number 757);
19. Notice of decision on exceptions dated March 7, 1914;
20. Decision of Hon. W. L. Whitney, dated June 25, 1914;
21. Judgment of the Circuit Court, First Circuit, entered June 26, 1914;

22. Exception by defendant to decision, dated June 30, 1914;
23. Exception by defendant to judgment, dated June 30, 1914;
24. Clerk's Minutes of the Circuit Court, First Circuit;
25. Defendant's Bill of Exceptions, dated September 14, 1914, with order allowing same, dated November 6, 1914;
26. Transcript of testimony on the first trial, filed January 13, 1914;
27. Transcript of testimony on the second trial, filed August 4, 1914;
28. Plaintiff's Exhibit "A," lease between John K. Sumner by Trustee and A. V. Gear, dated June 1, 1910, following which are the following, viz.: (1) consent and confirmation of lease by Robert Wyllie Davis; (2) assignment of lease by A. V. Gear to C. A. Peterson, dated October 12, 1910; (3) assignment of lease by C. A. Peterson to Addie B. Gear, dated October 12, 1910; and (4) assignment of lease by Addie B. Gear to Fred Harrison, dated October 21, 1910;
29. Plaintiff's Exhibit "C," assignment of lease, dated June 6, 1913, Addie B. Gear to Fred Harrison; [349]
30. Plaintiff's Exhibit "D," quitclaim deed, dated June 9, 1913, Cecil Brown, trustee, to Fred Harrison;
31. Plaintiff's Exhibit "E," assignment of lease,

dated June 16, 1910, A. V. Gear to Robert Wyllie Davis;

32. Defendant's Exhibit "1," assignment of lease, dated October 24, 1910, Fred Harrison to Addie B. Gear;
33. Defendant's Exhibit "2," assignment of lease, dated November 16, 1910, A. V. Gear to Fred Harrison;
34. Equity Record Number 1293, entitled in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, "In the Matter of the Trust Deed of John K. Sumner," said record consisting of the following, to wit:
 - (1) Petition of *cestui que trust* to appoint a new trustee, dated August 25, 1902;
 - (2) Resignation of Bruce Cartwright as Trustee, dated August 22, 1902;
 - (3) Order appointing new trustee, dated August 29, 1902, and
 - (4) Trust Deed, dated August 16, 1892, John K. Sumner to Bruce Cartwright;
35. Equity Record Number 1814, entitled in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, "Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife," said record consisting of the following, to wit:
 - (1) Bill of complaint, dated January 20, 1912, and attached thereto as parts thereof, are the following:

- (a) Lease dated June 1, 1910, between John D. Holt, trustee and A. V. Gear, following which are the following: (1) consent and confirmation of lease by Robert Wyllie Davis; (2) assignment of lease by A. V. Gear to C. A. Peterson, dated October 12, 1910; (3) assignment of lease by C. A. Peterson to Addie B. Gear, dated October 12, 1910; and (4) assignment of lease by Addie B. Gear to Fred Harrison, dated October 21, 1910;
- (b) Assignment of lease dated November 16, 1910, A. V. Gear to Fred Harrison, and
- (c) Agreement between A. V. Gear and Addie B. Gear, his wife, and Fred Harrison, dated June 9, 1911;
- (2) Chambers Summons, dated January 20, 1912, with return of service;
- (3) Answer of A. V. Gear, defendant, January 29, 1912;
- (4) Answer of Addie B. Gear, defendant, dated January 29, 1912;
- (5) Special appearance and motion to quash summons and service dated

February 1, 1912, and notice of motion;

- (6) Motion for decree of foreclosure, dated February 5, 1912, and decree of foreclosure entered February 6, 1912;
- (7) Commissioner's Return and Account of Sale, filed February 27, 1912, and attached thereto as parts thereof are the following:
 - (a) Affidavit of publication of notice of sale;
 - (b) Notice of sale;
 - (c) Receipt of W. T. Rawlins for \$185;
 - (d) Receipt of Job Batchelor, Commissioner, for \$75;
 - (e) Receipt of the Hawaiian Star Newspaper Association for \$38.95;
 - (f) Bill of James F. Morgan, Auctioneer, for \$50; and
 - (g) Statement of costs amounting to \$22;
- (8) Order confirming sale, dated February 28, 1912, and
- (9) Writ of Possession, dated April 24, 1912, with return of service by Wm. Henry, High Sheriff, Territory of Hawaii. [350]

36. Equity Record Number 1828, entitled in the Circuit Court of the First Judicial Circuit,

Territory of Hawaii, "Cecil Brown, Trustee, v. Robert Wyllie Davis," said record consisting of the following, to wit:

- (1) Bill of complaint, dated May 27, 1912, and attached thereto as Exhibit "A" thereof, is lease, dated June 1, 1910, between John D. Holt, Trustee, and A. V. Gear, following which are the following: (1) consent and confirmation of lease by Robert Wyllie Davis; (2) assignment of lease by A. V. Gear to C. A. Peterson, dated October 12, 1910; (3) assignment of lease by C. A. Peterson to Addie B. Gear, dated October 12, 1910; and (4) assignment of lease by Addie B. Gear to Fred Harrison, dated October 21, 1910;
- (2) Chambers Summons, dated May 27, 1912, with return of service attached thereto;
- (3) Stipulation that respondent have to and including June 15, 1912, within which to appear, plead, demur to or answer the bill of complaint, dated June 21, 1912;
- (4) Stipulation that respondent have to and including June 20, 1912, within which to appear, plead, demur to or answer the bill of complaint, dated June 15, 1912;

- (5) Motion by plaintiff for judgment and decree *pro confesso* dated June 21, 1912, and attached thereto are the affidavits of F. E. Thompson and Henry Smith;
 - (6) Decree entered June 21, 1912;
 - (7) Demurrer of respondent, dated June 21, 1912;
 - (8) Joinder in demurrer, dated June 26, 1912;
 - (9) Answer of defendant, filed July 24, 1912;
 - (10) Replication of Cecil Brown, Trustee, to answer of respondent, filed July 26, 1912;
 - (11) Motion by plaintiff to set case for trial, dated July 26, 1912, and notice of motion;
 - (12) Decision of Hon. W. L. Whitney on motion to set case for trial, filed August 14, 1912;
 - (13) Appeal and notice of appeal by plaintiff, dated August 14, 1912;
 - (14) Notice of decision on appeal from the Supreme Court, filed October 25, 1912; and
 - (15) Discontinuance filed March 27, 1915.
37. Law Record Number 7695 entitled in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, "Cecil Brown, Trustee, vs. Robert Wyllie Davis," said record consisting of the following:

- (1) Complaint, dated January 15, 1913, and attached thereto as Exhibit "A" thereof is lease dated June 1, 1910, between John D. Holt, Trustee, and A. V. Gear, following which, is the consent and confirmation of the lease by Robert Wyllie Davis;
- (2) Term summons, dated January 15, 1913, with return of service appended thereto;
- (3) Answer of defendant, dated February 7, 1913;
- (4) Demand by defendant for jury trial, dated February 7, 1913;
- (5) Motion by plaintiff to set case for trial and notice of motion, dated April 4, 1913;
- (6) Defendant's cost bill and notice of time for taxation of costs;
- (7) Decision dated June 25, 1913; and
- (8) Judgment entered June 27, 1913;
38. Opinion of the Supreme Court of Hawaii, rendered March 4, 1915;
39. Judgment of the Supreme Court of Hawaii, entered March 9, 1915; [351]
40. Petition for Writ of Error and Supersedeas to the Supreme Court of Hawaii, dated May 22, 1915, and appended thereto is the affidavit of E. C. Peters;
41. Assignment of Errors, dated May 22, 1915;

42. Supersedeas and cost bond on writ of error,
filed May 22, 1915;
43. Order allowing writ of error and supersedeas,
filed May 22, 1915, with return of service.

You will annex to and transmit with the record the original writ of error and citation with return of service, your return to the writ of error under the seal of the Supreme Court of the Territory of Hawaii and also your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Dated at Honolulu, T. H., July 21st, A. D. 1915.

Respectfully,

E. C. PETERS,

Attorney for Plaintiff in Error.

City and County of Honolulu,
Territory of Hawaii,—ss.

I, E. C. Peters, hereby certify that on, to wit, the 21st day of July, A. D. 1915, I served the foregoing praecipe upon W. D. Lymer, Esq., attorney for defendant in error, by depositing a full, true and correct copy thereof enclosed in an envelope in the U. S. Postoffice addressed to him at Honolulu, postpaid, in time to be delivered to him by the ordinary course of mail on July 22d, 1915.

E. C. PETERS.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Praecipe for Transcript. Filed July 22, 1915, at 8:30 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. [352]

In the Supreme Court of the Territory of Hawaii.

October Term, 1914.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

**Certificate of Clerk to Transcript of Record and
Return to Writ of Error.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within Writ of Error, the original whereof is herewith returned, being pages 340 to 342, both inclusive, of the foregoing transcript, and in pursuance to the praecipe to me directed, a copy whereof is hereto attached, being pages 348 to 352, both inclusive, DO HEREBY transmit to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 339, both inclusive, and I certify the same to be full, true and correct copies of the pleadings, record, entries, exhibits and final judgment which are on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii in the case entitled in said Court "Fred Harrison, plaintiff and defendant in error, vs. Robert Wyllie Davis, defendant and plaintiff in error, and Numbered 757 and 814. [353]

I do further certify that the Original Citation on Writ of Error, being pages 343 to 345, both inclusive, and the Original Order Extending Time for Preparation and Transmission of Record, being pages 346 to 347, both inclusive, of the foregoing transcript of record are hereto attached and herewith returned.

I lastly certify that the cost of the foregoing transcript of record is \$125.80, and that said amount has been paid by E. C. Peters, the attorney for the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, city and county of Honolulu, this 26th day of July, A. D. 1915.

[Seal] JAMES A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

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[Endorsed]: No. 2633. United States Circuit Court of Appeals for the Ninth Circuit. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed August 4, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.